THE DOCTRINE OF PAROL AGREEMENT TRUSTS AND FRAUD IN EQUITY: AN HISTORICAL-DOCTRINAL ANALYSIS OF EQUITY'S JURISDICTION UNDER THE HEAD OF FRAUD TO IMPOSE TRUSTS ARISING OUT OF PAROL AGREEMENTS.

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Abstract

This thesis examines, through the most comprehensive historical-doctrinal analysis to date, the nature and extent of equity's jurisdiction to impose trusts arising out of parol agreements. The central argument of this thesis is that all such trusts are enforced pursuant to a single doctrine of equity which arises to prevent fraud. This doctrine, which is uncovered and elucidated in this thesis, is named 'the doctrine of parol agreement trusts'. It is argued that the 'fraud' which brings the doctrine into play will occur if the recipient of property knowingly reneges on a parol agreement subject to which she took the property and upon which the other party thereto relied. Moreover, it is demonstrated that trusts arising for the prevention of fraud were, until the early twentieth century, not seen as express, resulting or constructive trusts, but that, according to modern nomenclature, they are best regarded as constructive trusts. This thesis also challenges several modern orthodoxies. It is proven that the leading case of *Rochefocuauld v Boustead* was reported imperfectly, and that all previously presented accounts of the facts are inaccurate. Furthermore, it is categorically demonstrated that secret trusts are enforced for the prevention of fraud, but that this is not inconsistent with the notion that secret trusts are *dehors* the will. The juxtaposition between parol agreement trusts and related equitable innovations such as mutual wills, proprietary estoppel and 'common intention' constructive trusts is also examined, as well as the doctrine's relationship with contract law and the law of agency, with a view to providing a doctrinal solution to some modern controversies in these areas. The historical-doctrinal relationship between parol agreement trusts and other types of constructive trusts is also examined with surprising results which suggest doctrinal affinities with the liability which affects knowing recipients. Finally, it is suggested that the manner in which modern commentators and some judges have

eschewed fraud as a justification for parol agreement trusts and other related trusts may represent an unwelcome development.

Contents

Chapter 1: Introduction

1.1 The Research Question

The purpose of this thesis is to analyse critically, through a historical-doctrinal lens and within the context of the law of trusts generally, the full range of circumstances in which equity will impose trusts for the prevention of fraud in order to give effect to parol agreements. The overriding aim is to trace the development of equity's jurisdiction to intervene in such circumstances with a view to ascertaining whether there is a doctrine which provides a common justification and mechanism for the enforcement of some or all such trusts, and to consider the place of any such doctrine within the law of trusts, from both a historical and a modern perspective. It is hoped that the fruits of this research might be of assistance in proposing doctrinally sound solutions to the many contemporary academic and judicial controversies relating to trusts arising out of parol agreements and constructive trusts generally.

1.1.1 What are Trusts Arising out of Parol Agreements (Parol Agreement Trusts)?

For the purposes of this thesis, trusts imposed by equity in order to give effect to parol agreements (referred to hereafter as parol agreement trusts) may arise when two parties agree that, upon one of the parties receiving title to certain specific property, he or she will hold it subject to a certain trust, or for a certain specified purpose. Parol agreement trusts usually, but not always, arise in circumstances in which statutory formality requirements would seem to preclude the creation of a valid parol trust. The Statute of Frauds 1677 introduced the relevant statutory formality requirements. Section 5 required all wills of land to be in writing and formally attested, and ss18-21 also greatly restricted the circumstances in which nuncupative

wills of personalty could be created. Section 5 has been superseded by the Wills Act 1837, s9 of which requires that all wills must be in writing signed by the testator and at least two witnesses. Section 7 of the Statute of Frauds, which has been replaced by the Law of Property Act 1925, s53(1)(b), required trusts of land to be evidenced in writing. The requirements of s53(1)(b) are, for the purposes of this thesis indistinguishable from those laid down by s7.

Depending on the nature of the agreement and other circumstances surrounding the acquisition of the property by the party in question, equity may determine that, notwithstanding the formality requirements, he or she takes as a trustee in order to give effect to what was agreed. There is a wide range of situations in which equity will intervene in such a manner. Examples include secret trusts[1] and trusts of the type imposed in the well-known cases of *Bannister v Bannister*[2], *Pallant v Morgan*[3] and *Rochefoucauld v Boustead*.[4] It is at least arguable that, *inter alia*, 'common intention constructive trusts'[5] and trusts arising pursuant to the doctrine of mutual wills[6] are also types of parol agreement trusts.

1.2 How the Research Question will be Answered

1.2.1 Research methods

1.2.1.1 Primary research method

There is a great wealth of authorities, stretching back several hundred years, concerning parol agreement trusts. As will be seen, however, most commentators

[1] See, for example, *Blackwell* v *Blackwell* [1929] AC 318, HL.
[2] [1948] 2 All ER 133, CA.
[3] [1953] Ch 43, CA.
[4] [1897] 1 Ch 196, CA.
[5] See *Lloyd's Bank v Rosset* [1991] AC 107, HL; *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432; *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.
[6] See *Re Goodchild* [1997] 1 WLR 1216, CA; *Re Walters* [2008] EWCA Civ 782, [2009] Ch 212.

whose work focusses on various kinds of parol agreement trusts only cover the historic case law in a relatively superficial manner, preferring instead to examine the extent to which the more recent authorities concerning parol agreement trusts may be assimilated within theoretical models which have been conceived in order to rationalise various aspects of the law of property.

Rather than seeking to assess the compatibility of the authorities with any pre-conceived theories, the aim of this thesis is to consider the extent to which any principles or doctrines may be divined from the relevant case law. In other words, the intention is to establish what the law *is*, rather than what it ought to be. In order to assess the strength of any such findings, the degree and depth of judicial consensus relating thereto will be examined. Accordingly, a historical-doctrinal approach will be employed as the primary research method.[7] The nature and development of equity's jurisdiction, as it relates to the research question, will be ascertained through thorough analysis of all available authorities, as well as historical treatises and commentaries, and all relevant statutory provisions.

It is pertinent at this point to recognise that the availability of most law reports[8] and some historical treatises online, particularly in databases such as Westlaw, Lexis Library and Hein Online, provides the modern doctrinal researcher with considerable advantages over his or her predecessors, particularly in terms of the ability to browse and search law reports electronically. It is thus intended that, aided by modern technology, the doctrinal analysis undertaken for the purposes of this thesis will be the most rigorous to date in terms of authorities consulted.

[7] For support of the doctrinal method as the most appropriate means by which to establish what the law is, see T Hutchinson, 'Doctrinal Research' in D Watkins and M Burton (eds), *Research Methods in Law* (Routledge, Abingdon, 2013) 28.

[8] Although some series which proved very useful to this thesis, such as the Law Times Reports, the Weekly Notes and the Law Journal Chancery Reports, are still unavailable online.

1.2.1.2 Secondary research methods

It is recognised that, in order to make best use of, and to glean maximum understanding of, any principles and doctrines which may be divined from the case law, it will be necessary on occasion to make reference to political and social factors and developments, particularly from a historical perspective. The most significant uses of such methods will be highlighted during the course of the thesis (most notably, below at 3.1-3.2).

1.2.2 The various aspects of the research question

In order to address the primary research question, there are several distinct, albeit interrelated, issues which arise. These issues can be summarised as follows:

1.1.2.1 How should parol agreement trusts be categorised for the purpose of the doctrinal analysis?

Traditionally, in many of the leading texts, parol agreement trusts arising out of *post mortem* transactions are separated from those arising out of *inter vivos* transactions.[9] Frequently, secret trusts are considered alongside mutual wills.[10] *Inter vivos* parol agreement trusts, on the other hand, are covered in a variety of ways. The trusts arising in cases such as *Rochefoucauld* and *Bannister* are often considered together,[11] whilst cases in the *Pallant* line are often afforded separate

[9]See, for example, J Glister and J Lee, *Hanbury & Martin, Modern Equity* (20th edn, Sweet & Maxwell, London, 2015); S Panesar, *Exploring Equity & Trusts* (2nd edn, Pearson, Harlow 2012); P Pettit, *Equity & the Law of Trusts* (12th edn, OUP, Oxford, 2012); P Davies & G Virgo, *Equity & Trusts, Text, Cases & Materials* (OUP, Oxford, 2013).
[10]Panesar, *Exploring Equity* (n 9); Pettit, *Equity* (n 9); A J Oakley, *Constructive Trusts* (3rd edn, Sweet & Maxwell, London 1997).
[11] E.g. Glister and Lee, *Modern Equity* (n 9) 134-135.

treatment,[12] and other important recent *inter vivos* cases, such as *Staden v Jones*,[13]are regularly omitted altogether.[14]

A novel approach will be taken in this thesis. In all of the scenarios under consideration, the party granting the property which becomes subject to the parol agreement trust will be represented by 'A', and the grantee by 'B'. The beneficiary, in cases where s/he is other than A, will be represented by 'C'. The vast bulk of parol agreement trusts can be categorised, according to the nature of the transactions, as follows:

> Category one: cases where A conveys to B subject to a parol agreement that B would hold on trust for A;[15]
>
> Category two: cases concerning transfers from A to B subject to a parol agreement between A and B;[16]
>
> Category three: cases concerning conveyances from A to B subject to a parol agreement between B and C that B will purchase all or part of the estate on behalf of C.

Category one parol and two agreement trusts, both being trusts in which A is party to the parol agreement, are examined within two separate sections of Chapter Two. Category three parol agreement trusts, in which A has nothing to do with the parol agreement, are analysed in chapter 3. As will be elucidated in Chapter Three, the

[12] Davies & Virgo, *Equity & Trusts* (n 9) 448-455; Pettit, *Equity* (n 9) 219-220.
[13] [2008] EWCA Civ 936, [2008] 2 FLR 1931.
[14] Davies & Virgo, *Equity & Trusts* (n 9); B McFarlane and C Mitchell, *Hayton & Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies* (14th edn, Sweet & Maxwell, London, 2015); B McFarlane, N Hopkins & S Nield, *Land Law, Text, Cases and Materials* (3rd edn, OUP, Oxford, 2015); Panesar, *Exploring Equity* (n 9).
[15] E.g. *Bannister* (n 2).
[16] E.g. secret trusts cases and cases such as *Staden* (n 13).

facts of *Rochefoucauld* are more closely analogous with those of *Pallant* than with other categories of parol agreement trusts, despite *Rochefocuald* having been sometimes described as a case analogous to category one[17] or category two[18] parol agreement trusts. It is suggested that this categorisation will provide the structure which is best served to address the research question because it will be possible to survey comprehensively judicial responses to analogous factual scenarios.

1.1.2.2 What are the facts of Rochefoucauld v Boustead?

Rochefoucauld is perhaps the most important single case considered in this thesis. It has long been regarded as the leading case concerning the recognition and enforcement of trusts arising out of *inter vivos* parol agreements,[19] and it has also been cited as providing the doctrinal platform from which common intention constructive trusts were developed.[20] It might seem strange, then, that no definitive version of the facts of *Rochefocuauld* has been presented,[21] and that various versions appear in the literature.[22] Ascertaining the precise facts is very important; without this knowledge, it is difficult to establish what proposition of law, in respect of trusts arising out of parol agreements, *Rochefoucauld* is authority for. This aspect of the research question is afforded detailed treatment in Chapter Two.

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[17] N Hopkins, 'Conscience, Discretion and the Creation of Property Rights' (2006) 26 LS 475.
[18] E.g. *De Bruyne v De Bruyne* [2010] EWCA Civ 1519, [2010] 2 FLR 1240 [51] (Patten LJ); S Gardner, 'Reliance-based Constructive Trusts', in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart, Oxford, 2009); L A Sheridan, *Fraud in Equity* (Pitman, London 1957) 180.
[19] For some recent examples of *Rochefoucauld* being cited within the context of parol agreement trusts, see *Crossco No. 4 v Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 [93] (Etherton LJ); *De Bruyne* (n 18) [51] (Patten LJ); *Samad v Thompson* [2008] EWHC 2809 (Ch), [2008] NPC 125 [128] (Sales LJ); *Singh v Anand* [2007] EWHC 3346 (Ch) [144] (Norris J); *Banner Homes Group Plc. v Luff Developments Ltd.* [2000] Ch 372, CA, 383 (Chadwick LJ); *AM v SS* [2014] EWHC 2887 (Fam) [23] (Coleridge J).
[20] See *Re Densham* [1975] 1 WLR 1518, Ch, 732 (Goff J); M P Thompson, *Modern Land Law* (4th edn, Oxford, OUP, 2009), 298.
[21] The closest is Y K Liew '*Rochefoucauld v Boustead* (1897)', in P Mitchell & C Mitchell (eds), *Landmark Cases in Equity* (Hart, Oxford 2012). There are, however, several factual inaccuracies in this account.
[22] See below, 3.2.1 (especially n 21) for details of the different interpretations of cases which have been proposed by commentators.

1.1.2.3 What is the nature and contemporary relevance of equitable fraud?

It is well-established that the prevention of fraud is the historical reason why parol agreement trusts were enforced.[23] Most commentators, however, see this as an outdated justification[24] Furthermore, it is often assumed that fraud in equity is similar to fraud at common law, and must involve some element of personal gain or ill intent on the part of the perpetrator.[25] This understanding of equitable fraud provides many jurists with a key reason why fraud is of diminished relevance to the modern law.[26] One of the most significant questions to be addressed in this thesis, therefore, is the extent to which the prevention of fraud should still be regarded as the central justification for the enforcement of any or all species of parol agreement trusts. This will require careful consideration of the nature of equitable fraud as can be ascertained from the authorities. Consideration of this question will pervade all chapters of this thesis, with a particular focus in Chapter Four, which will seek to synthesise the fruits of the analysis in Chapters Two and Three.

It should also be noted that there are several commentators for whom fraud is either no longer relevant to parol agreement trusts, or is reduced to a mere label of limited significance, who insist that, in order for equity to enforce a trust in furtherance of a parol agreement, it must be demonstrated that, were the trust not be enforced, B would gain personally[27] or the other party to the parol agreement (A or C, as the

[23] See, for example, cases such as *Rochefoucauld* (n 4); *McCormick v Grogan* (1869) LR 4 HL 82.
[24] See especially B McFarlane, 'Constructive Trusts Arising on a Receipt of Property Sub Conditione' (2004) LQR 667; Gardner, 'Reliance-based Constructive Trusts' (n 18) 64; Glister and Lee, *Modern Equity* (n 9) 135; Panesar, *Exploring Equity* (n 9) 204.
[25] P Critchley, 'Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts' (1999) 115 LQR 631; McFarlane, 'Constructive Trusts' (n 24).
[26] See, for example, Critchley, 'Instruments of Fraud' (n 25); J Feltham, 'Informal Trusts and Third Parties' [1987] Conv 246 (especially in respect of *inter vivos* parol agreement trusts); McFarlane, 'Constructive Trusts' (n 24); Gardner, 'Reliance-based Constructive Trusts' (n 18); L A Sheridan, 'English and Irish Secret Trusts' (1951) LQR 314; Pettit, *Equity* (n 9) 99; Glister and Lee, *Modern Equity* (n 9) 135.
[27] See McFarlane, 'Constructive Trusts' (n 24); N Hopkins, 'The *Pallant v Morgan* Equity' [2002] Conv 35 (in respect of the 'joint purchase' cases).

case may be) would suffer some loss or detriment.[28] There is also some judicial support for such stances.[29] The relevance of gain, loss and detrimental reliance to the primary research question will therefore also be explored throughout this thesis, and summarised in Chapter Four.

1.1.2.4 What is the modern relevance of the principle that equity will not allow a statute to be used as an instrument of fraud?

Historically, the enforcement of parol agreement trusts in instances which would appear to conflict with statutory formality requirements has been justified on the ground that equity will not allow a statute to be used as an instrument of fraud (hereafter referred to as 'the instrument of fraud principle'). This principle is often regarded as outmoded, and its compatibility with the doctrine of parliamentary sovereignty is frequently called into question.[30] This thesis will thus examine the continued relevance and constitutionality of the instrument of fraud principle, as well as the juxtaposition between this principle and the prevention of fraud generally as a justification for parol agreement trusts. Again, there will be particular emphasis on this issue in Chapter Four.

1.1.2.5 What is the jurisprudential justification for the enforcement of secret trusts?

Of all of the kinds of parol agreement trusts, secret trusts have attracted the most academic controversy, with many theories having been proposed in order to justify their enforcement. Furthermore, some commentators have suggested that secret

[28] In K Gray and S F Gray, *Elements of Land Law* (5th edn, OUP, Oxford, 2008), 882, it is stated that there must be a 'change of position or detrimental reliance… in order that a constructive trust should arise in English law'. See also Gardner, 'Reliance-based Constructive Trusts' (n 18) 68 (Gardner explains the detriment as a 'reliance loss'); Hopkins, *Ibid* (in respect of the 'joint purchase cases'); Liew, '*Rochefoucauld*' (n 21).
[29] *McCormick* (n 23); *Banner Homes* (n 19); *Hodgson v Marks* [1971] Ch 892.
[30] See below, 4.6 for discussion of this point.

trusts are anomalies in the modern law, incapable of being convincingly justified.[31] As secret trusts are, for the purposes of this thesis, regarded as category three parol agreement trusts, the reasons for their enforcement will be subjected to doctrinal analysis in Chapter Two.

1.1.2.5 What type of trusts are parol agreement trusts?

Whether the various types of parol agreement trusts should be classified as express, constructive or resulting trusts has proven to be a rather tricky question. If parol agreement trusts are enforced pursuant to a single doctrine, it might be thought that they should all be classified as the same types of trust, and for the same reasons.[32] Although most modern commentators classify all parol agreement trusts as constructive, there are numerous dissenting opinions, many of which suggest that parol agreement trusts are not all trusts of the same kind,[33] and the prevention of fraud as a reason for the enforcement of parol agreement trusts is rarely treated as relevant to explaining their classification.[34] Furthermore, there is some degree of discord in the modern case law,[35] and there are some apparent inconsistencies in some older authorities.[36] This thesis will thus investigate, within Chapters Two, Three and Four, how parol agreement trusts are best classified and the extent to which the classification of the trusts is bound to the reasons for their enforcement.

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[31] For discussion of the academic controversy relating to secret trusts, see below, 2.3.1.
[32] Although c.f. N Hopkins 'Conscience, Discretion and the Creation of Third Party Rights' (2006) 26 LS 475.
[33] Although the most popular view is that all of the trusts to be considered here are constructive trusts, there are many dissenting voices. See, for example, W Swadling 'The Nature of the Trust in *Rochefoucauld v Boustead'* in Mitchell, *Constructive and Resulting Trusts* (n 18) 68; LA Sheridan ''English and Irish Secret Trusts' (1951) LQR 314; Hopkins 'The *Pallant v. Morgan* "Equity"' (n 27); S Manley, 'Reconceptualising the Fully Secret Trust' (2015) 21 Trusts and Trustees 802; Panesar, *Exploring Equity* (n 9) 139, 217-218.
[34] This is so even when it is argued that parol agreement trusts are all constructive trusts enforced pursuant to a single doctrine. See Gardner, 'Reliance-based Constructive Trusts' (n 18) 68; McFarlane, 'Constructive Trusts' (n 24), 676.
[35] See *Ali v Khan* [2002] EWCA Civ 974, [2009] WTLR 187; *Hodgson* (n 29).
[36] See *Rochefoucauld* (n 4); *Re Duke of Marlborough* [1894] 2 Ch 133, Ch.

1.1.2.6 The relationship between parol agreement trusts and other types of trusts

In order to establish the place of parol agreement trusts within modern equity, it will be necessary to consider, in Chapter Five, their jurisprudential relationship with other trusts and similar doctrines. It is anticipated that the unparalleled depth of the historical-doctrinal research that will be conducted will enable fresh light to be shed upon which trusts, historically, bore affinities with some or all types of parol agreement trusts. The law of constructive trusts generally is a very fertile source of academic debate; it is hoped that, by comparing the jurisprudential origins and requirements of parol agreement trusts with other types of constructive trusts, it will be possible to advance understanding of the historical connections between some of the various types of trusts which are today, or have from time to time been, regarded as constructive trusts. To this end, there will be particular emphasis on common intention constructive trusts, mutual wills, 'subject to contract' constructive trusts,[37] proprietary estoppel and knowing recipients. Although the latter may appear at first glance to be an unusual subject for comparison, knowing recipients and all types of parol agreement trustees have long been held to be made trustees on the ground of fraud; the significance of this apparent similarity will be assessed.

1.3 Why will the Intended Treatment of the Research Question as Lead to an Original Contribution to Knowledge?

In conclusion to this first chapter, it is anticipated that the manner in which the research question will be addressed will represent an independent and original contribution to knowledge and understanding of an area of equity which is currently

[37] Such as the trust in *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044, Ch.

the subject of extraordinary academic discord. The thesis will contain the most thorough historical-doctrinal survey of relevant authorities to date, and will be the first to employ this research method in an analysis of all types of parol agreement trusts. For the purposes of this survey, the cases will be categorised within an original structure in order to provide clarity and consistency of analysis. Furthermore, the facts of one of the leading cases will be laid down in detail for the first time. This will enable fresh insights to be drawn in respect of the nature and significance of the precedents laid down in that case. It should also be noted that several articles which are derived from certain parts of this thesis have been accepted in leading peer-reviewed journals.[38] Furthermore, these articles have been cited a positive light in leading texts[39] and in the High Court of Justice of Trinidad and Tobago.[40] This evidences the academic influence and potential to challenge academic orthodoxies that certain aspects of this thesis have already demonstrated.

[38] G Allan, '*AM v SS*: Fraud and Uncertainty' [2015] 4 Conv 340; G Allan, 'Ceylon Coffee, the Comtesse and the Consignee: A Historical Reappraisal of *Rochefoucauld v Boustead*' (2015) 36 JLH 43; G Allan, 'Once a Fraud, Forever a Fraud: the Time-Honoured Doctrine of Parol Agreement Trusts' (2014) 34 LS 419; 'The Secret is Out There: Searching for the Doctrine of Secret Trusts through Analysis of the Case Law' (2011) 40 CLWR 311.

[39] E.g. the (2014) 34 LS 419-443 article has been cited in B McFarlane, McFarlane, Hopkins and Nield, *Land Law* (n 14); McFarlane and Mitchell, *Hayton & Mitchell* (n 14); G Virgo, *The Principles of Equity & Trusts* (2nd edn, OUP, Oxford 2016) 320. The (2011) 40 CLWR 311 article has been cited in Pettit, *Equity* (n 9); C Huws, *Text, Cases and Materials and Equity & Trusts* (Pearson, Harlow, 2015); S Manley, 'Reconceptualising the Fully Secret Trust' (2015) 21 T&T 802.

[40] *Re Harrygin Singh* (24 January 2012) http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/rajkumar/2010/cv_10_1371DD24jan2012.pdf accessed 13 July 2016.

Chapter Two: Category One and Two Parol Agreement Trusts[1]

2.1 General Introduction

This chapter is concerned with parol agreement trusts in which A is a party to the parol agreement. These trusts fall into two categories. In the first category, A surrenders his or her land to B subject to a parol agreement that B will hold the land for the benefit of A or at some point reconvey to A. In category two parol agreement trusts, B takes subject to a parol trust agreed with A, in favour of C, the latter not being a party to the parol agreement. These cases can arise in respect of agreements relating to both the *post mortem* and *inter vivos* disposal of property. The former, usually known as secret trusts, appear frequently in the case law, whilst the latter are relatively rare.

The aim of this chapter is to consider the extent to which the prevention of fraud and the instrument of fraud principle are relevant to the enforcement of these categories of parol agreement trust. The nature of equitable fraud, as may be gleaned from the authorities, will also be examined. Finally, the proper classification of these trusts as express, resulting or constructive trusts will be considered. Owing to the different considerations raised by these two types of trusts, they will be considered separately.

[1] This chapter contains material published in G Allan, 'Once a Fraud, Forever a Fraud: the Time-Honoured Doctrine of Parol Agreement Trusts' (2014) 34 LS 419; 'The Secret is Out There: Searching for the Doctrine of Secret Trusts through Analysis of the Case Law' (2011) 40 CLWR 311.

2.2 Category One Parol Agreement Trusts

2.2.1 The historical and contemporary relevance of fraud

Cases of this nature have occurred with relative frequency since the Statute of Frauds, often in circumstances where the grantor has wanted to conceal his or her ownership of property for a particular reason,[2] or where the grantee has wished to gain title to land on a temporary basis in order to obtain secured finance[3], although there have been cases arising out of deliberate attempts by the grantor to deceive the grantee into surrendering title to his property.[4]Although it might be thought that the decisions in this line of cases are plagued by inconsistency, in respect of the relevance of fraud, this is not so.

According to the vast bulk of authorities from over 300 years, B is made trustee for A for the prevention of fraud, and the instrument of fraud principle explains the inapplicability of the Law of Property Act 1925, s53(1)(b) and its predecessor section.[5] An early case which illustrates the operation of this principle is *Hutchins v Lee*.[6] Here, the plaintiff was in ill health and felt unable to manage his affairs properly. He therefore assigned a lease to the defendant subject to an oral agreement that the latter would hold the lease on trust for the plaintiff and transfer it back to him upon his restoration to good health. The suit arose when the defendant

[2]For example, in *Davies v Otty (No 2)* (1865) 35 Beav 208, 55 ER 875 where the plaintiff conveyed land to the defendant because the plaintiff feared that he may be charged with bigamy and as a result thereof lose his land. It was agreed that, when the danger was passed, the land would be returned to the plaintiff. See also *Haigh v Kaye* (1872) LR 7 Ch App 469, for another similar example.
[3]e.g. *In Re Duke of Marlborough* [1894] 2 Ch 133, Ch; *Ali v Khan* [2002] EWCA Civ 974, [2009] WTLR 187; *Kuppusami v Kuppusami* [2002] EWHC 2578 (Ch).
[4]e.g. *Bannister v Bannister* [1948] 2 All ER 133, CA; *Hodgson v Marks* [1971] Ch 892, CA.
[5]See *Wilkinson v Brayfield* (1693) 2 Vern 307, 23 ER 799 at n 1; *Hutchins v Lee* (1737) 1 Atk 447, 26 ER 284, 285 (Lord Hardwicke LC); *Cripps v Jee* (1793) 4 Bro CC 472, 29 ER 994 476 (Arden MR); *Haigh* (n 2) 474 (James LJ); *Booth v Turle* (1873) LR 16 Eq 182, 188 (Malins VC); *Re Duke of Marlborough* (n 3) 141 (Stirling J); *Bannister* (n 4) 136 (Scott LJ).
[6] (n 5).

refused to re-assign the lease. Lord Hardwick stated that 'though there can be no parol declaration of a trust, since the [Statute of Frauds], yet this evidence is proper in avoidance of fraud, which was here intended to be put on the plaintiff'.[7] The recent cases of *Ali v Khan*[8] and *Kuppusami v Kuppusami*,[9] show that the prevention of fraud is still the underlying justification for the enforcement of such trusts today.[10]

In each authority in which the enforcement of the parol agreement was attributed to the prevention of fraud, there was a parol *agreement* reached between A and B, pursuant to which the property was conveyed, rather than a mere oral declaration of trust by either party. This shows that the cases within this line cannot simply be regarded as instances in which parol declarations of trust were enforced. Rather, it is the bilateral nature of the agreement, and A's subsequent reliance thereupon, which triggers equity's intervention on the ground of fraud. Contrarily, there several cases in which property was conveyed from A to B, for purposes other than to transfer the beneficial interest, but not subject to any actual agreement reached between A and B. None of these cases were enforced on the ground of fraud. Instead, they were enforced as resulting trusts.[11]

In stark contrast to the number of authorities favouring the prevention of fraud as the justification for the enforcement of the trusts in B's favour, there is only one example, *Hodgson v Marks*,[12] of a category one parol agreement trust being enforced for

[7] ibid 448 (Lord Hardwicke LC). For a similar explanation, see *Booth* (n 5) 187 (Malins VC).
[8](n 3).
[9](n 3).
[10]In *Ali* (n 3) [22] and [35], Morritt VC, giving the Court of Appeal's judgment, relied on *Marlborough*, describing it as a case of 'fraud', as well as *Haigh* and *Rochefoucauld*. For further discussion of *Ali*, see below, text to n 186. In *Kuppusami* (n 3) [72], Rimer J relied directly on *Ali*.
[11] Examples include *Birch v Blagrave* (1755) Amb 264, 27 ER 176 and *Platermore v Staple* (1815) G Coo 250, 35 ER 548; *Childers v Childers* (1857) De G & J 482, 44 ER 810.
[12] (n 4).

reasons other than the prevention of fraud.[13] As will be explained below,[14] the reasoning in *Hodgson* was arguably based on an erroneous understanding of the nature of fraud in equity, which led the Court of Appeal to hold that the instrument of fraud principle could not apply. It is unfortunate that, being an anomalous case, *Hodgson* is often regarded as a leading authority.[15] The prominence of *Hodgson* in some of the literature perhaps undermines the fact that, in virtually all authorities concerning category one parol agreement trusts, the enforcement of category one parol agreements was unequivocally attributed to the prevention of fraud.

2.2.2 Observations on the nature of fraud in equity

Several of the cases in this category shed light on the nature of equitable fraud. Although some involved deliberate deceit or wilful dishonesty on the part of B,[16] several did not. Some early authorities, such as *Wilkinson v Brayfield*[17] and *Hutchins*[18] suggest that a deliberate intent to deceive is an essential ingredient of fraud within the context of category one parol agreement trusts. It should be recognised, however, that both *Wilkinson* and *Hutchins* are cases where there *was* a deliberate attempt by B to deceive A into transferring the land into his name. Thus, it is not surprising that the judgments referred to the nature of the *malus animus*. In neither case was it stated that cases of equitable fraud are restricted to instances of deliberate deceit by B and, in fact, Lord Hardwicke, who adjudicated in *Hutchins*,

[13] Note that in *Davies* (n 2) Romilly MR, 213, describes the defendant's attempt to rely on s7 in order to keep the property as 'not honest'. The word 'fraud' is not used. Nevertheless, it was confidently asserted in *Haigh* (n 2) 474 (James LJ) and in *Booth* (n 5) 188 (Malins VC) that *Davies* was decided on the instrument of fraud principle.
[14] See below, 2.2.3.
[15] E.g. B McFarlane and C Mitchell, *Hayton & Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies* (14th edn, Sweet & Maxwell, London, 2015) 89; P Pettit, *Equity and the Law of Trusts* (10th edn, OUP, Oxford 2006) 95.
[16] E.g. *Bannister* (n 4).
[17] (n 5) at n 1.
[18] (n 5) 285 (Lord Hardwicke LC).

held on several occasions, in cases involving other types of parol agreement trusts, that there could be equitable fraud without any intentional deceit.[19]

Moreover, there are several cases in which category one parol agreement trusts were enforced absent any deliberate wrongdoing on B's part. In *Cripps v Jee*, B unwittingly reneged upon the parol agreement because he was declared bankrupt. A had conveyed land to B as security for a loan, subject to an oral agreement that, subject to repayment, B would hold on trust for A. As A and B were relatives, they did not deem it necessary for the agreement to be reduced to writing. B later became bankrupt, and his assignees sought to rely on the absolute nature of the conveyance. B was held to have taken as trustee for A, and A was thus permitted to enforce the trust against B's assignees in bankruptcy, on the ground that the case was one of 'a pious fraud'.[20] Similarly, in *Re Duke of Marlborough*, A (the Duchess) conveyed land to B (the Duke), in order that B could mortgage it. It was agreed between A and B that the conveyance was merely for the purposes of enabling B to take a loan. B died without having conveyed the equity of redemption to A. Even though Stirling J was of the opinion that, prior to his death, B 'was willing and intended to reconvey'[21], the case was still held to be one of fraud,[22] and A was able to enforce the trust against B's estate.

Perhaps the strongest authority in favour of the view that equitable fraud does not depend on any finding of deliberate dishonesty by B is *Bannister v Bannister*.[23] A

[19] E.g. *Drakeford v Wilks* (1747) 3 Atk 539, 26 ER 1111, discussed below at 2.3.4.2; *Young v Peachy* (1741) Atk 254, 26 ER 557, discussed below at 3.4.1.
[20] *Cripps* (n 5) 476 (Arden MR).
[21] *Re Duke of Marlborough* (n 3) 146 (Stirling J).
[22] Ibid 141.
[23] (n 4).

was an elderly widow who had been persuaded by her brother-in-law, B, to sell two cottages to him for a price much below market value. Prior to the sale, they had agreed orally that she would be permitted to reside rent free in one of the cottages for the remainder of her life. After a few years, B sought to have A evicted from the cottage. It is therefore reasonable to say that, irrespective of his motives at the time of the parol agreement, B's attempt to evict A, in flagrant breach of the parol agreement, was dishonest. The Court of Appeal did not, however, focus on B's dishonest conduct; Scott LJ, giving the judgment of the Court of Appeal, was at pains to explain that deliberate deceit is not a necessary ingredient of equitable fraud. At first instance, it had been held that there was no fraud in the case because B had not intended, at the time of the parol agreement, to defraud A. The Court of Appeal did not agree:

> It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available.[24]

[24] *Bannister* (n 4) 136 (Scott LJ).

Accordingly it was held that it was 'fraudulent in [B] to insist on the absolute character of the conveyance for the purpose of defeating the beneficial interest which he had agreed [A] should retain', even if he 'may have been innocent of any fraudulent intent in taking the conveyance in absolute form'.[25]

This reasoning is significant because it demonstrates that the fraud lies in any breach of the parol agreement. B's motivation for entering into the parol agreement and taking the conveyance is immaterial, as is the question of *why* B breached the parol agreement. Rather, the Court of Appeal's reasoning can equally be applied to cases such as *Marlborough* and *Cripps* in which there was no dishonesty. This very strongly suggests that wilful dishonesty is not a necessary ingredient of fraud in equity.

In *Hodgson*, the nature of equitable fraud was viewed in rather different terms. The Court of Appeal recognised that the instrument of fraud principle was generally the reason for the recognition of category one parol agreement trusts, but seemingly held that the principle was not applicable to the facts. A, an elderly widow with no children, was persuaded by B, her lodger, to convey her land to him, subject to a parol agreement that the house was to remain hers. B then sold the land to the defendant, against whom A sought to assert her beneficial interest.[26] Russell LJ, with whom Buckley LJ and Cairns LJ agreed, was uncertain as to whether, because the defendant was innocent of any wrongdoing, the instrument of fraud principle could apply against him. The trust was thus held to be a resulting trust, arsing on the

[25] ibid 136 (Scott LJ).
[26] According to the Land Registration Act 1925, s70(1)(g), an interest under a trust belonging to 'someone in actual occupation of the land' at the time of the registered disposition could override.

presumption that it had not been the intention of A and B that A should surrender her beneficial interest.[27] Russell LJ's dismissal of fraud is inconsistent with judgments such as *Bannister*, *Cripps* and *Marlborough*. It is submitted that in *Hodgson* it would have been preferable for the court to have regarded B as having taken as trustee for A for the prevention of fraud (which was undoubtedly perpetrated by B when he treated the land as his own). According to the rules of registered land, this trust was able to bind the defendant as it had bound B.[28] Overall, it is suggested that *Hodgson* is best regarded as an anomalous decision, and not representative of the law relating to category one parol agreement trusts.

2.2.3 The classification of category one parol agreement trusts

Whilst it is clear that the bulk of authorities suggest that category one parol agreement trusts are enforced for the prevention of fraud, it should be noted that there is some inconsistency in the case law regarding the classification of these trusts. The possibility that category one parol agreement trusts are express trusts, although in occasional receipt of academic support, [29] is unfeasible as there is not a single authority in favour of this proposition. Furthermore, it is useful here to recall Lord Hardwicke's observation in *Hutchins* that, since the introduction of statutory formality requirements for express trusts of land, 'there can be no parol declaration of a trust'.[30]

Unlike express trusts, category one parol agreement trusts have occasionally been

[27] *Hodgson* (n 4) 933 (Russell LJ).
[28] In fact, Russell LJ seemed to accept this as an alternative to the resulting trust solution (*Hodgson* (n 4) 933).
[29]See, for example, Pettit, *Equity* (n 15) 95.
[30]*Hutchins v Lee* (n 5) 448 (Lord Hardwicke LC).

held to be resulting trusts. In *Hodgson*, as has been seen, a resulting trust was imposed in consequence of a misapplication of the instrument of fraud principle. In another recent Court of Appeal case, *Ali v Khan*,[31] the trust was also described as a resulting trust, although for different reasons. Here, A conveyed his land to his daughter, B (and initially to another daughter who later pulled out of the arrangement), so that B could use her favourable credit rating to obtain secured finance and also so that she could sponsor her husband's immigration. It was orally agreed that A would retain some form of 'ownership' of the land, and that B would re-convey the land to A at some time in the future. Morritt VC, with whom Rix LJ and Swinton Thomas LJ agreed,[32] followed *Haigh* and *Marlborough*. He described both cases as examples of trusts enforced for the prevention of fraud,[33] but he proceeded to classify them as cases involving the imposition of resulting trusts.[34]

In fact, there is little in either *Marlborough* or *Haigh* to support Morritt VC's interpretation. In *Marlborough*, Stirling LJ observed that counsel for the plaintiff had raised the Statute of Frauds, s8, but stated that that the proper answer to the defence's plea of s7 was that 'to exclude the evidence would be to permit the Statute of Frauds to be used to cover a fraud'.[35] Similarly, in *Haigh,* James LJ mentioned s8, probably again in deference to counsel's arguments, but based his judgment on the prevention of fraud.[36] It should at this point be noted that s8 was generally interpreted by the courts as exempting resulting trusts from the requirement of s7,

[31](n 3). *Ali* was directly followed in *Kuppusami* (n 3).
[32]With whom Rix LJ and Sir Swinton Thomas agreed.
[33]*Ali* (n 3) [21] and [22] (Morritt VC).
[34]ibid [35] (Morritt VC).
[35]*Re Duke of Marlborough* (n 3) 140-141(Stirling J).
[36]*Haigh* (n 2) 474 (James LJ).

but not any other types of trusts.[37] In both *Haigh* and *Marlborough*, enforcing the parol agreement trust for the prevention of fraud was presented by the court as an *alternative* to relying on s8. Thus, it is submitted that there is no basis for classifying either *Haigh* or *Marlborough* as cases concerning resulting trusts. It thus follows that there was no basis for the classification of the trust in *Ali* as a resulting trust.

A final point to note is that it is an established rule that any finding of an actual agreement in respect of the apportionment of the beneficial interests in the property displaces any presumption that could give rise to a resulting trust.[38] As both *Ali* and *Hodgson* are cases in which the court accepted that there was a parol agreement between A and B as regards the beneficial ownership of the property, the presumption of resulting trust ought to have been rebutted in both cases. It is thus submitted that the reasoning behind the classification of the trusts in *Hodgson* and *Ali* fails to stand up to scrutiny. Furthermore, there are no other cases (save for *Kuppusami,* in which the court directly followed *Ali*) in which category one parol agreement trusts have been held to be resulting trusts. Therefore, there is little to commend the view that category one parol agreement trusts ought to be regarded as resulting trusts.

In terms of constructive trusts, *Bannister* is the only authority, albeit a strong Court of Appeal authority, in which it was held that a category one parol agreement trust is a constructive trust. It should be noted that the Court of Appeal cited[39] *Booth* and *Marlborough,* as well as some cases concerning other categories of parol agreement

[37]See below, 3.5.1.4 for detailed discussion of this point.
[38]This rule most obviously manifests itself in cases concerning inferred common intention constructive trusts- see *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.
[39]*Bannister* (n 4) 136 (Scott LJ).

trusts[40] as authorities for the proposition that the constructive trust arises for the prevention of fraud, despite the fact that the phrase ‘constructive trust’ was not mentioned in any of those cases. In fact, it is notable that, prior to *Bannister*, the authorities conspicuously fail to classify the parol agreement trusts as express, resulting or constructive; *Bannister* is the earliest case in which a category one parol agreement trust was classified in this way.

Surprisingly, the overriding trend in virtually all of the nineteenth century authorities in which a category one parol agreement trust was enforced is the trust was classified simply as one for imposed for the prevention of fraud, as if this was an alternative classification to that of express, resulting or constructive trust. In none of these cases was the trust which was recognised and enforced described as being either express, resulting or constructive. Furthermore, the prevention of fraud has been held to be an *alternative* to the classification of category one parol agreement trusts as resulting trusts. It would therefore seem that, according to nineteenth century equity, if a trust was found to have arisen for the prevention of fraud, no further classification or justification were necessary.

2.3 Category Two Parol Agreement Trusts

Category two cases are far more numerous, and have been the subject of far more academic debate, than category one cases. Firstly, the academic controversies, particularly in relation to secret trusts, will be examined, followed by a critical analysis of the role of fraud *vis a vis* category two cases, and of what these cases show about the nature of fraud. The proper classification of trusts within this category

[40]E.g. *Chattock v Muller* (1878) LR 8 Ch D 177; *Rochefoucauld v Boustead* [1897] 1 Ch 196, CA.

will then be afforded consideration.

2.3.1 Secret trusts- introduction and academic controversies

There are two types of secret trusts, fully secret trusts and half-secret trusts. The former arises when a legatee, or in cases of intestacy, the deceased's next-of-kin (B), takes some or all of the testator's or intestate's (A's) property subject to an agreement, made with A during his or her lifetime, to hold some or all of that property on a certain trust (for C). B is often referred to in the literature (although not in the authorities) as a 'secret trustee'. A half-secret trust arises when B is identified on the face of the A will as a trustee, but the terms of the trust and the identity of C do not appear in the will and, prior to the execution of the will, B has agreed with A that s/he will hold the property in question on a certain trust (for C). It is generally accepted that if A demonstrates intention to subject B to a trust obligation and this intention is communicated to and accepted by B during A's lifetime[41] or, in the case of half-secret trusts, before or contemporaneously with the will's execution,[42] then the secret trust is enforceable. The effect of these requirements is that there must be an '"*agreement*," a "*bargain* [original italics] between [A] and [B]"—a communication between the parties during A's life, which can be construed into a trust'.[43]

Academic contributions to the debate have mainly focussed on how and why secret trusts are enforced, seemingly in defiance of the clear statutory provisions in the Wills Act 1837.

Most discussions regarding secret trusts focus on two theories, the 'fraud theory' and

[41]See *Ottaway v Norman* [1972] Ch 698, Ch, 702.
[42]See *Blackwell v Blackwell* [1929] AC 318, HL 334 and 339 (Viscount Sumner).
[43]*Wallgrave v Tebbs* (1855) 2 Kay & J 313, 69 ER 800, 322 (Page Wood VC), partly quoting from *Muckleston v Brown* (1801) Ves Jun 53, 91 ER 934, 69 (Lord Eldon LC).

the '*dehors* the will theory'. These are usually presented as competing theories,[44] although they have also been proposed as being complementary.[45] The fraud theory proceeds along the lines that because equity will not permit B to perpetrate a fraud by relying on s9 of the Wills Act in order to avoid performance of the secret trust, it will be enforced, notwithstanding the statute. The generally accepted view is that fraud must involve personal gain by B.[46] If fraud is understood in this way, secret trusts are difficult to justify, especially half-secret trusts, as B, being identified on the face of the will as a trustee, cannot take the secret trust property for himself, regardless of whether or not the secret trust is performed. Furthermore, fully secret trusts in which B was honest could not be enforced on this basis.[47] Even fully-secret trusts with dishonest secret trustees are difficult to justify if fraud must involve personal gain, for an order requiring B to hold the secret trust property on resulting trust for A's estate would prevent fraud of this type without the need to enforce the secret trust in seeming defiance of the Wills Act.[48]

In light of these theoretical problems, those advocating the orthodox form of the fraud theory have proposed a variety of reasons why half-secret trusts are enforced. It has been asserted that half-secret trusts are enforced because they are

[44]See for example, D Hodge, 'Secret Trusts: The Fraud Theory Revisited' [1980] Conv 341; P Critchley, 'Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts' (1999) 115 LQR 631; E Challinor, 'Debunking the Myth of Secret Trusts' [2005] Conv 492; S Panesar, *Exploring Equity & Trusts* (2nd edn, Pearson, Harlow 2012); R Pearce and J Stevens, *The Law of Trusts and Equitable Obligations*, 3rd edn (Oxford University Press: Oxford, 2005) Chapter 7; J Glister and J Lee, *Hanbury & Martin, Modern Equity* (20th edn, Sweet & Maxwell, London, 2015) Chapter 6.

[45]See especially J G Fleming 'Secret Trusts' (1947) 12 Conv 28; S Wilson, *Todd and Wilson's Textbook on Trusts*, 9th edn (Oxford University Press: Oxford, 2009) Chapter 10.

[46]See, for example, L A Sheridan, 'English and Irish Secret Trusts' (1951) LQR 314; J A Andrews, 'Creating Secret Trusts' (1963) 27 Conv 92; P Matthews, 'The True Basis of the Half-Secret trust?' [1979] Conv 360; B Perrins, 'Secret Trusts: The Key to the *Dehors*?' [1985] Conv 248; Critchley, 'Instruments of Fraud' (n 44); Challinor, 'Debunking the Myth' (n 44); B McFarlane, 'Constructive Trusts arising on a Receipt of Property Sub Conditione (2004) LQR 667; S Manley, 'Reconceptualising the fully-secret trust' (2015) 21 Trusts and Trustees 802; Panesar, *Exploring Equity* (n 44).

[47]See, for example, *Drakeford v Wilks* (n 19), *Sweeting v Sweeting* (1863) 33 LJ Ch 211; *Re Stead* [1900] 1 Ch 237, Ch and the cases concerning the Mortmain Act 1736, discussed below at 2.3.4.3.1.

[48]This argument is referred to by McFarlane, 'Constructive Trusts' (n 46).

incorporated into the A's will under the probate doctrine of incorporation by reference. Unfortunately, this doctrine does not sit easily with the requirements that secret trusts be communicated and accepted, or with the absence of any requirement that a half-secret trust be reduced to writing.[49] Generally, however, those who insist that fraud must involve personal gain reach the conclusion that the fraud theory cannot justify the enforcement of secret trusts.[50] An alternative position is that the concept of fraud in equity extends beyond fraudulent enrichment, and that any failure by B to perform the secret trust constitutes a fraud on A (often referred to as 'fraud on the testator') and C. The minority who subscribe to this view[51] argue that the fraud theory can explain the enforcement of both fully and half-secret trusts because equitable fraud need not involve any element of personal gain. Advocates of the fraud theory in either form are not in agreement regarding whether secret trusts are express or constructive.[52]

The *dehors* the will theory, which is the most widely accepted justification for the doctrine, is based on the idea that the Wills Act is irrelevant to the enforcement of secret trusts. There is, however, a dichotomy of opinion regarding precisely how and why a secret trust should fall outside of the scope of the Wills Act. The favoured standpoint is that a secret trust is an express *inter vivos* trust that remains

[49]See Sheridan, 'English and Irish Secret Trusts' (n 46); Matthews, 'The True Basis' (n 46), on the incorporation by reference theory. See below, 2.3.4.3.2 for consideration of the extent to which the authorities support this theory.
[50]See especially McFarlane, 'Constructive Trusts' (n 46); Challinor, 'Debunking the Myth' (n 44); Panesar, *Exploring Equity* (n 44); Pearce and Stevens, *The Law of Trusts* (n 44); A. Hudson, *Equity & Trusts*, (7th edn, Cavendish, London 2013) Chapter 6. Critchley, 'Instruments of Fraud' (n 44), asserts that the fraud theory can provide a partial justification, but cannot explain the enforcement of half-secret trusts or fully secret trusts with honest secret trustees.
[51]Hodge, 'Secret Trusts' (n 44); Wilson S, *Todd & Wilson's Textbook on Trusts* (9th edn OUP Oxford 2009); Fleming, 'Secret Trusts' (n 45).
[52]For differing opinions, see the works cited ibid and (n 50). See also McFarlane and Mitchell, *Hayton & Mitchell* (n 15) 116.

unconstituted until the death of A[53] or until B actually receives title from the executors;[54] this view renders the fraud theory redundant, but raises awkward questions as to whether secret trusts of land ought to comply with the Law of Property Act 1925, s53(1)(b). Others argue that a secret trust is *dehors* the will because it is a constructive trust, although opinions differ as to why this should be so.[55] The main criticism of the *dehors* theory is that secret trusts are by their very nature testamentary dispositions, and that therefore it is disingenuous to suggest that they fall outside of the Wills Act.[56]

What emerges from the literature is that academic opinion is bewilderingly divided. It appears, however, that academics have not been inclined to attempt to find a solution or unifying principle through doctrinal analysis of all of the case law. This part of the thesis, in seeking doctrinal solutions to these controversies, will thus present the most thorough doctrinal analysis of secret trusts to date.

2.3.2 Inter vivos category two parol agreement trusts: the academic controversies

A might also make an *inter vivos* transfer to B subject to a parol agreement that B will take as trustee for C. Far less has been written about these *inter vivos* equivalents of secret trusts, perhaps owing to the strange scarcity of reported cases. Nevertheless

[53]Critchley, 'Instruments of Fraud' (n 44) 640, describes this as the more 'sophisticated' version of the *dehors* theory. See also D Kincaid, 'The Tangled Web: the Relationship between a Secret Trust and a Will' [2000] Conv 420; Panesar, *Exploring Equity* (n 44) 205.
[54]S Manley, 'Reconceptualising the Fully Secret Trust' (n 46). Manley argues that fully secret trusts are self-declared (by B) express trusts.
[55]See especially McFarlane, 'Constructive Trusts' (n 46).
[56]See especially Critchley, 'Instruments of Fraud' (n 44).

there is some debate as to whether the trust is enforceable in C's favour,[57] or whether instead a resulting trust for the benefit of A should be imposed.[58] On point to be taken into account is that, in these cases, if a resulting trust is imposed in A's favour, then assuming that A is still alive, A could transfer the property as s/he wished. This has been cited as an important difference from the situation with secret trusts, for in cases of the latter type, A will always be deceased at the time at which any resulting trust could be imposed.[59] It should be noted that, despite the historical rarity of cases concerning *inter vivos* category two parol agreement trusts, there are two recent authorities which post-date the most influential academic contributions, and which will be analysed in this thesis.[60]

2.3.3 The Historical and Contemporary Relevance of Fraud to Secret Trusts

In *Re Snowden,*[61] Megarry VC dismissed fraud as being merely 'the historical origin of the doctrine',[62] explaining that nowadays, 'secret trusts may be established in cases where there is no possibility of fraud'.[63] This is frequently accepted as an accurate statement.[64] Analysis of the authorities, however, reveals *Snowden* to be anomalous. More than forty cases spanning over three centuries[65] have been identified in which the prevention of fraud is referred to as being the underlying justification for the doctrine, including House of Lords judgments concerning both

[57]As argued by T Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*' (1984) 43 CLR 306; TG Youdan, 'Informal Trusts and Third Parties: a Response' [1988] Conv 267.
[58]See N Hopkins, 'Conscience, Discretion and the Creation of Property Rights' (2006) 26 LS 475, 496-497; J Feltham 'Informal Trusts and Third Parties' [1987] Conv 246.
[59] See N Hopkins ibid 496-497; Feltham ibid 248.
[60] *De Bruyne v De Bruyne* [2010] EWCA Civ 1519, [2010] 2 FLR 1240 and *Staden v Jones* [2008] EWCA Civ 936, [2008] 2 FLR 1931 were both decided after the leading recent work of Hopkins, ibid.
[61][1979] Ch 528, Ch.
[62]ibid 535.
[63]Ibid.
[64]For example, Megarry VC's comments have recently been cited with approval in two tribunal cases, *Taylor v Revenue & Customs Commissioners* [2008] STC (SDC) 1159; *Davies v Revenue and Customs Commissioners* [2009] UKFTT 138, TC.
[65]See Appendix for details.

fully[66] and half-secret trusts. [67] It is therefore curious that *Snowden,* a first instance decision, has been afforded such significance, and it is submitted that any assertions that fraud is no longer relevant to the enforcement of secret trusts can be debunked immediately by sheer weight of authority. Serious questions remain, however, regarding the nature of the fraud. These questions can best be answered by analysing the development of the doctrine in relation to fraud.

2.3.4 Observations on the nature of equitable fraud in secret trusts cases

In order to trace the development of judicial understanding of the nature of the fraud which secret trusts are enforced to prevent, the secret trusts cases will be analysed in chronological order. As the dichotomy between fully and half-secret trusts was not fully established until the nineteenth century, it is only from then onwards that the two species of secret trusts will be treated separately.

2.3.4.1 Authorities from the seventeenth century

Secret trusts cases began to appear in the law reports very soon after the enactment of the Statute of Frauds.[68] Although case reports from this period are unhelpfully brief, the word 'fraud', without further elaboration, is used to justify the enforcement of fully secret trusts in two early cases.[69]

An interesting early judgment is *Chamberlaine v Chamberlaine*.[70] Although the word

[66] *McCormick v Grogan* (1869) LR 4 HL 82; *Cullen v Attorney General for Ireland* (1866) LR 1 HL 190.
[67] *Blackwell* (n 42).
[68] The earliest case after the Statute of Frauds is *Dutton v Pool* (1677) 1 Vent 318, 83 ER 523. It is cited in *Oldham v Litchford* (1705) 2 Freem 285, 23 ER 923 by the Lord Keeper as being 'immediately after the statute (of Frauds)', so it can be safely presumed that the Statute of Frauds did apply to the will in this case.
[69] *Thynn v Thynn* (1684) 1 Vern 296, 23 ER 479 and *Devenish v Baines* (1689) Prec Ch 3, 24 ER 2.
[70] (1678) 2 Freem 34, 22 ER 1041. Although there is no actual mention of the Statute of Frauds in this case, the Statute seems to have applied. It was described in *Caton v Caton* (1865) LR 1 Ch App 137, 143 (Stuart VC) as a

'fraud' was not expressly used, Lord Nottingham provided some insight into the reasons why B was not permitted to renege upon his undertaking. A confided to B, his eldest son and heir, that he was contemplating changing his will in order to provide for his other children (C). B assured him that there was no need; he would pay the 'legacies' out of his inheritance. After A's death, B sought to renege upon the agreement. Lord Nottingham enforced the secret trust on the ground that B had 'solemnly undertaken' to pay the legacies and A had died *'in peace upon the said promise* [italics added].'[71] It thus seems that Lord Nottingham attached significance to the fact that A had relied on the secret trust arrangement. It is also important to note that there is no mention in any of the early cases of fraud needing to entail personal gain. In fact, in *Pring v Pring,*[72] the earliest useful half-secret trust case,[73] it was not possible for B to gain personally from failure to perform the secret trust[74]. This was evidently seen as no bar to the secret trust's enforcement.

Overall, the seventeenth century authorities demonstrate that early secret trusts were enforced for the prevention of fraud. Moreover, these cases strongly suggest

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case in which 'the Court has, notwithstanding the Statute of Frauds, interfered… in order to prevent a fraud'. See also the commentary at 2 Eq Ca Abr.

[71]Ibid.

[72](1689) 2 Vern 99, 23 ER 673.

[73]Note that the half-secret trust case of *Crook v Brooking* (1688) 2 Vern 50, 23 ER 643; (1689) 2 Vern 106, 23 ER 679 concerned events which occurred many years before the Statute of Frauds and there is no useful reasoning in either of the reports.

[74]The defendant's argument in *Pring* was that 'though the will doth call them executors in trust and that it might be collected from the will that the executors were not to have more than 20 shillings a-piece, yet it is not said for whom the trust is, and therefore it shall be taken to be a trust for all, who might come in and take the benefit by the statute for distribution of intestate's estates, and not for the wife alone'. Thus, the basis of the defendant's argument was not that he should take absolutely in his capacity as executor, but that the trust should, in the absence of named beneficiaries on the face of the will, be construed as being for the benefit of all entitled in intestacy, rather than solely to the wife. 'An Act for the Better Setling of Intestate's Estates 1670-71' is presumably the statute that was referred to in the defendant's argument. This statute provided that, in the event of an intestacy, one third of the estate was to go to the deceased's wife and the remainder in equal portions to the deceased's children and, in the case of there being no wife, the estate was to be equally distributed amongst the children. Finally, if there were no children, the estate was to be distributed equally amongst the testator's 'next of Kindred'. Unless the defendant was one of those entitled to take under this Act, then there was no possibility of his gaining personally as a result of his submissions. There is no indication from the case that he was so entitled. This is notable as it appears to undermine the contention of counsel for the plaintiff in *Re Fleetwood* (1880) LR 15 Ch D 594, 600 that, in *Pring* the executor 'claimed to hold the property himself'.

that a finding of fraud did not depend on any dishonest intention on the part of B at the time of the parol agreement, nor upon the question of whether B stood to gain personally from any failure to perform. Rather, it seems that A's reliance on the parol agreement provided the basis for equity's intervention.

2.3.4.2 Authorities from the eighteenth century

The reports from this century are far more detailed than those from the previous one, and there are a number of reports from this period in which the nature of fraud is considered in detail. All of the cases from the eighteenth century involve fully secret trusts. Perhaps the most comprehensive analysis appears in *Reech v Kennigal*[75], in which Lord Hardwicke, in upholding a secret trust, explained the nature of the fraud in some detail. The facts, in brief, are as follows. B, who was the defendant, was also A's residuary legatee. He had agreed to pay £100 from the residuary estate to C, assuring A that it was unnecessary for the will to be amended so as to include this legacy. Counsel for B conceded that he had broken his promise, but insisted that a mere breach of promise such as this was not a fraud. Lord Hardwicke rejected this argument, stating that 'it has been taken as if the fraud must be on the person, who might have remedy at law: but this court considers it as a fraud also upon the testator',[76] going on to explain that, on the facts, there was 'a breach of promise; but attended also with fraud upon the testator as well as the plaintiff, by representing as if there was no occasion to alter the will'.[77] Although in this case B did stand to gain personally from his refusal to perform the secret trust, crucially, Lord Hardwicke, when explaining the nature of the fraud and why B had committed a fraud, made no

[75](1748) 1 Ves Sen 123, 27 ER 932.
[76]ibid 125 (Lord Hardwicke LC).
[77]ibid.

mention of personal gain or fraudulent enrichment. Instead, his Lordship stated that:

> the statute should never be understood to protect fraud; and therefore whenever a case is infected with fraud,… the court will not suffer the statute to protect it, so as that *any one* [italics added] should run away with a benefit not intended.[78]

This strongly indicates that Lord Hardwicke was of the view that, in order to prove equitable fraud, it is not necessary for B to have benefited from his betrayal of the parol agreement.

The view of fraud elucidated by Lord Hardwick was not unique to the period; in *Oldham v Litchford,*[79] Lord Cowper described B's attempt to avoid performance of the trust as 'a fraud upon the testator and the legatee,'[80] and in *Sellack v Harris*,[81] the same judge upheld a secret trust 'because of the Fraud in this Case, in that [B] promised [A] upon his Death-bed that [C] should enjoy the Lands, so he took this to be a case out of the Statute'.[82] Similarly, in *Barrow v Greenough*[83], Arden MR stated that, when determining whether to give effect to a secret trust, 'the question is, whether the confidence, that [B] would perform the trust he undertook, did not prevent [A] from making a new will'.[84] This again suggests that reliance by A on the parol agreement was regarded as an essential ingredient of fraud. *Barrow* is also

[78]ibid.
[79](n 68).
[80] ibid.
[81](1708) 20 Eq Ca Abr 46
[82] ibid.
[83](1796) 3 Ves Jun 152
[84]ibid 154. See also *Paine v Hall* (1812) 18 Ves Jun 475, 34 ER 397, where Lord Eldon expresses a similar idea, although this is *obiter*: '…there is no evidence of a trust expressed, nor of such an engagement by words, or by silence, as would authorize the Court to say, the devisees undertook to do that, which prevented the devisor from imposing it upon them, as a trust'.

significant on account of the fact that B, reluctant to assume the office of trustee, advised A that he should execute a new will instead of relying on the secret trust. Although B eventually agreed to A's plans, Arden MR pointed out that his initial reticence when asked to be a trustee meant that he 'had no intention of fraud at that time'. [85] This shows that, as with category one parol agreement trusts, the state of mind of B at the time of the parol agreement is immaterial in determining whether a fraud was eventually perpetrated.

Given that any requirements of personal gain are entirely absent from definitions of fraud from this period, it is perhaps unsurprising that in *Drakeford v Wilks*,[86] a secret trust was enforced even though B had died without gaining personally or even attempting to do so. Lord Hardwicke's reasoning was that:

> a will being ambulatory, if [A] has a conversation with [B], and [B] promises that, in consideration of the disposition in favour of her, she will do an act in favour of a third person, and [A] lets the will stand, it is very proper that the person who undertook to do the act should perform, because, as I must take it, if [B] had not so promised, [A] would have altered her will.[87]

This also suggests that, once again, A's reliance on the secret trust agreement was critical to the court's reasoning.

These definitions of fraud do not, however, mean that the court simply gives effect to

[85] ibid.
[86] (n 19).
[87] Ibid.

A's wishes in the face of the statutory formality requirements. In *Whitton v Russell*,[88] it was clear to A by the time of his death that the secret trustees (Bs) did not intend to perform their secret trust obligations. Thus, Lord Hardwick refused to enforce the purported secret trust on the basis that A was not 'drawn by this promise (of Bs), not to add the legacy to this codicil'.[89] So, in this case, fraud on the testator, was not present. As Lord Hardwicke pertinently put it, 'every breach of promise is not to be called a fraud'[90].

The authorities discussed above indicate that, during the eighteenth century, it was firmly established that secret trusts are enforced to prevent 'fraud on the testator' (i.e. fraud on A)[91], and that this fraud arises if the undertaking by B, upon which A relied, is not carried out. Those who assert that the historical basis for the doctrine is the prevention of fraudulent enrichment are incorrect. Surprisingly, none of the commentators who argue that the prevention of fraud on A is the justification for the enforcement of secret trusts cite any of the cases from this period.

2.3.4.3 Authorities from the nineteenth century

2.3.4.3.1 Fully secret trust cases

Most of the authorities from his century are consistent with those from the previous century in that secret trusts are explained as being enforced to prevent the fraud which arises when B deviates from the secret trust agreement on which A relied. In

[88] (1739) 1 Atk 448, 26 ER 285.
[89] ibid 449.
[90] ibid. This refutes arguments such as that of Challinor, 'Debunking the Myth' (n 44), who considers the 'fraud on the testator' argument to be 'a bald assertion that a testator's wishes should be put into effect in a manner that is not acceptable'.
[91] Although, for two errant authorities, see *Jones v Nabbs* (1718) Gilb Rep 146, 25 ER 102 and *Kingsman v Kingsman* (1706) 2 Vern 559, 23 ER 962.

Muckleston v Brown,[92] a case concerning the Mortmain Act 1736,[93] Lord Eldon stated that secret trusts are enforced 'on the ground that that [A] would not have devised the estate to [B], unless he had undertaken to pay that sum. The principle is that the statute shall not be used to cover a fraud',[94] and in *Chamberlain v Agar,*[95] Plumer VC referred to:

> that Species of Fraud, which consists of not complying with a Promise, on which [A] relied where [A], having come under such an Obligation, transfers it to his [B]; who give a positive Assurance to fulfil it: [A], relying on that Assurance; and under that Confidence abstaining from inserting the Legacy in his Will.[96]

This approach was continued later in the century. In *Jones v Badley,*[97] for example, Lord Cairns, paraphrasing Sir Page Wood VC in *Wallgrave v Tebbs,*[98] who was in turn quoting Turner LJ in *Russell v Jackson,*[99] stated that the doctrine exists 'for the prevention of fraud',[100] explaining that when B undertakes:

> that he will carry [A]'s intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust …

[92](n 43).
[93]The Mortmain Act 1736 essentially prohibited devises of land to charities or in trust for charitable purposes (see s1). There are a number of cases in which a testator devised land to a legatee, subject to an agreement outside of the will that the legatee would use the land for charitable purposes. Typically, the action would be brought by the residuary legatees who would claim that the legatee in question took the land subject to a binding secret trust for charitable purposes. If this claim was upheld, the land in question would be held by the would-be secret trustee on resulting trust for the testator's estate on the grounds that it was an illegal devise.
[94] (n 42) 69. See also *Stickland v Aldridge* (1804) 9 Ves Jun 517, 32 ER 703, 519.
[95] (1813) 2 Ves & Bea 259, 35 ER 317.
[96] ibid 262.
[97] (1868) LR 3 Ch App 362.
[98](n 43) 321.
[99](1852) 10 Hare 204, 68 ER 900, 211-212.
[100](n 97) 364.

> [because] no one can doubt that, if [B] had stated that he would not carry into effect the intentions of [A], the disposition in his favour would not have been found in the will.[101]

This view was approved in the House of Lords in *Cullen v Attorney-General for Ireland*[102] by Lord Westbury, who described C's interest as being created by B's promise, 'the breach of which confidence would amount to a fraud'.[103]

The House of Lords case of *McCormick v Grogan,*[104] particularly Lord Westbury's judgment, is generally regarded as the leading case on the fraud theory, and is generally taken as authority that fraud must involve personal gain by B,[105] and that an unusually high standard of proof must be applied in secret trusts cases. If phrases from the judgment are taken in isolation, this view appears reasonable. Lord Hatherley stated that secret trusts should only be enforced in 'clear cases of fraud'[106] when there has been a 'fraudulent inducement'[107] by B. Lord Westbury used even stronger language, emphasising 'the criminal character of fraud',[108] explaining that the doctrine is based on ' personal fraud'[109] which is only present if 'a *malus animus*, is proved by the clearest and most indisputable evidence'[110] that B 'knew that [A]

[101]ibid. The original passage from Sir Page Wood was also quoted with approval by Lord Romilly in *Proby v Landor* (1860) LR 3 Ch App 362 and in *Rowbotham v Dunnett* (1878) 8 Ch D 430. This shows the great consistency during this period.
[102](n 66).
[103]ibid 198.
[104](n 66).
[105]See *Snowden* (n 61), and, by extension, those judgments relying on *Snowden*. See also Challinor, 'Debunking the Myth' (n 44); Pearce and Stevens, *The Law of Trusts* (n 44); Glister and Lee, *Modern Equity* (n 44); Hudson, *Equity and Trusts* (n 50).
[106] (n 66) 89.
[107] ibid.
[108]ibid 97.
[109]ibid.
[110]ibid.

intestate was beguiled and deceived by his conduct'.[111] The wording used by their Lordships is, it is respectfully submitted, unfortunate, particularly as many commentators all but ignore the pre-*McCormick* cases and instead focus on these eye-catching but ultimately misleading turns of phrase.

A different picture emerges when the judgments are read fully. Lord Hatherley, once again,[112] followed the established view of fraud, explaining that a secret trust arises due to the 'fraud thus committed by the heir in inducing the testator to die intestate, upon the faith of the heir's representations that he would carry all such wishes as were confided to him into effect',[113] thus clarifying his comments regarding the need for a fraudulent inducement. He made no statement regarding the standard of proof to be applied.

Lord Westbury similarly explained that a secret trust will be imposed when A 'communicates the disposition... and the disponee assents to it, either expressly, or by any mode of action which the disponee knows must give to the testator the impression and belief that he fully assents to the request'.[114] What Lord Westbury seems to have meant is that once it is established that B has led A to believe that he will perform the secret trust by expressly or implicitly acceding to A's requests, the court will insist that he fulfils his promise, otherwise A *will* have been 'beguiled and deceived'[115] and the fraud *will* have been 'proved by the clearest and indisputable

[111]ibid 98.
[112]Note that Lord Hatherley was known as Sir Page Wood prior before becoming Lord Chancellor. See his judgments in *Wallgrave* (n 43) 321; *Tee v Ferris* (1856) 2 K & J 357, 69 ER 819, 367-368.
[113](n 66) 88.
[114]ibid 97.
[115]ibid 98.

evidence'.[116] Lord Westbury did not mention the need for an especially high standard of proof. Rather, he was explaining the nature of the fraud and why communication and acceptance are essential requirements for valid secret trusts. If B does not perform a properly communicated and accepted secret trust, he is committing a personal fraud or a '*malus animus*'.[117] His use of the word 'criminal'[118] to describe fraud, when read in the context of the rest of his speech and the other authorities from the period, is likely to be a mere reinforcement of the idea that equity regarded it as repugnant for B to renege on his promise.

Lord Westbury's explanation of the legatee being converted into a trustee merely by his acceptance of the secret trust obligation is irreconcilable with the view that he regarded equitable fraud as synonymous with fraud in common law or even criminal law. In fact, as Solicitor-General,[119] it appears that Lord Westbury stated that, in secret trusts cases, there must be an arrangement, 'the abandonment of which by [B] would amount to a fraud on the testator'[120] and that this 'fraud or *malus animus* lay in the [secret trustee] inducing, by his promise, the testator to confer on her bounty, which, otherwise, he would not have conferred'.[121] This interpretation is also corroborated by his comments on the nature of secret trusts in *Cullen,*[122] and by the fact that Lord Cairns, in *McCormick,*[123]professed concurrence with Lord Westbury.[124] It is peculiar that, given how frequently Lord Westbury is cited as the leading

[116]ibid 97.
[117]ibid.
[118]ibid.
[119]Lord Westbury, then Sir Richard Bethell, served as Solicitor General between 1852 and 1856.
[120]*Lomax v Ripley* (1855) 3 Sm & Gif 48, 65 ER 558, 63. It appears from the report that these are Sir Richard Bethell's words. If not, the only other likely explanation is that this is part of what is apparently a joint submission from counsels for the various defendants.
[121]ibid, 64.
[122](n 66) 198.
[123](n 66) 99. Lord Cairns did not give a full speech.
[124]Lord Cairns's view of the nature of the fraud is clear. See *Jones v Badley* (n 97) 364.

authority on the fraud theory,[125] this interpretation of his speech has virtually no currency. The orthodox interpretation of Lord Westbury's judgment has long provided ammunition for critics of the fraud theory, enabling them to bolster their position with House of Lords authority. That interpretation, it is submitted, is incorrect, and arguments and authorities relying on it[126] should be reconsidered.

Support for the interpretation of *McCormick* which is presented here can be gleaned from *Norris v Frazer,*[127] a peculiar case in which B was a married woman. Upon the death of A, B's husband, who had never promised to perform the secret trust, became entitled to the trust property in right of her. It is apparent from the facts of the case that neither the husband nor the wife had sought to enrich themselves fraudulently. Owing to coverture, B could not gain personally, and the husband's conduct throughout had been 'frank and honourable and fair in every respect'.[128] Nevertheless, the secret trust was enforced because 'a more direct, a more personal fraud could not be committed than for [the wife] to refuse to perform that promise which she made to the testator on his death bed'.[129] Tellingly, Bacon VC cited Lord Westbury's speech in *McCormick* as his main authority. Similarly, in *Re Boyes*,[130] Kay J, who cited *McCormick,* stated that B's promise is:

> binding the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is to be presumed that if it had not been for such promise the testator would not have made or would have revoked the

[125]See (n 105).
[126]Ibid.
[127](1873) LR 15 Eq 318.
[128]ibid 330.
[129]ibid 331.
[130](1884) LR 26 Ch D 531.

gift.[131]

Evidently, in the late nineteenth century, Lord Westbury was not regarded as having introduced a requirement that fraud must entail personal gain.

In conclusion, in light of the academic disharmony on the same point, the uniformity in the case law regarding fraud in relation to fully secret trusts during this period is extraordinary. The underlying justification for the enforcement of fully secret trusts was repeatedly held to be the instrument of fraud principle, and fraud was repeatedly held to arise upon any breach by B of an undertaking on which A relied when deciding how to devise his property. There was no inconsistency during this period, not even in *McCormick.*

2.3.4.3.2 Half-secret trust cases

Although *Muckleston v Brown*[132] has been mentioned in relation to fully secret trusts, in fact it was unclear in this case whether or not the face of the will identified B as a trustee.[133] Although Lord Eldon considered whether the trust was fully or half-secret, he reached no conclusion on this point, instead explaining that the basis for the enforcement of secret trusts is prevention of fraud on A. This strongly suggests that Lord Eldon thought that all secret trusts share a common justification. This line of reasoning was followed in *Podmore v Gunning.*[134] Although the alleged half-secret trust was not upheld, Shadwell VC stated that, had sufficient evidence been

[131]ibid 535.
[132](n 43).
[133]A's residuary estate consisted, *inter alia*, of an estate in Overseal, Derbyshire. Although the will devised the residuary estate absolutely to B, A then executed a codicil devising a farm to B 'upon trust for the like uses and purposes as my manor and estate at Overseal now stand limited'. The plaintiffs (A's next-of-kin) claimed that B had taken the estate at Overseal on secret trust for charitable purposes.
[134](1836) 8 Sim 644, 58 ER 985.

adduced, he would have given effect to the half-secret trust on the ground of fraud.[135]

In *Smith v Attersoll,*[136] a half-secret trust was enforced although Lord Gifford did not explain why. He did, however, describe C 'not as legatees, but as *cestuis que trust*'[137] and he described the letter containing the half-secret trust's details as 'not to be considered as testamentary',[138]citing a fully secret trust case as authority.[139] This suggests that the half-secret trust was not incorporated into the will by reference, as has been claimed,[140] rather that it was enforced on the instrument of fraud principle.

Another case which has been cited by proponents of the incorporation by reference theory[141] is *Johnson v Ball,*[142] in which a half-secret trust that was not committed to writing until after the will's execution was held void on the ground that to enforce it 'would be to receive, as part of or as codicils to the will, papers subsequent in date to the will, which are unattested'.[143] Parker VC proceeded to explain that fully secret trust cases 'have no application to the present; *nor... have those cases cited in the argument, in which the will refers to a trust* [italics added] created by [A] by communication with [B] antecedently to or contemporaneously with the will.[144] Parker VC's description of validly communicated half-secret trusts as being created 'by

[135]ibid 656- 660.
[136](1826) 1 Russ 266.
[137]ibid. 271.
[138]ibid 270-271.
[139]*Jones v Nabbs* (1718) Gilb Rep 146, 25 ER 102.
[140]See Matthews, 'The True Basis' (n 46) 363.
[141]ibid.
[142](1851) 5 De G & Sm 84, 64 ER 129.
[143]ibid 90-91.
[144]ibid 91.

communication'[145] strongly suggests that he did not consider them to be incorporated into the will by reference. It should be noted that although the details of the half-secret trusts had actually been orally communicated to the trustees prior to the will's execution, the will referred to the half-secret trusts 'being appointed by letter'. Thus, the non-enforcement of the orally communicated trusts should not be seen as evidence in favour of the incorporation argument because enforcing these trusts would have been inconsistent with the will.[146] It should also be noted that, in *Irvine v Sullivan,*[147] a half-secret trust that was orally communicated prior to the will's execution but not reduced to writing until afterwards was enforced without question. In fact, there is only one case, *Re Baillie,*[148] in which the court declined to enforce an orally communicated half-secret trust. The doctrine of incorporation by reference was not mentioned, however, and North J's reasoning was unclear.

Another instructive case is *Briggs v Penny,*[149] in which although the half-secret trust's terms had been put in writing prior to the will's execution, no communication appeared to have taken place. Knight-Bruce VC explained that unattested papers can by admitted either under 'the power of [A] to incorporate in his will another existing paper'[150] or for 'the prevention of fraud, by compelling B to perform, after [A]'s death, a promise made by him to [A], upon the faith of which [A], to the knowledge of [B], gave the legacy.'[151] That he ordered the determination of whether communication had been made[152] indicates that he would have been prepared to

[145]There is no requirement that, for a document to be incorporated into a will by reference, it must be communicated to the legatee. See *In bonis Smart* [1902] P 238 at 240, cited in Glister and Lee, *Modern Equity* (n 44) 147, for a summary of the requirements for a document to be incorporated into the will by reference.
[146]See alos *Re Keen* [1937] Ch 326, CA.
[147](1869) LR 8 Eq 673. See *Re Young* [1952] Ch 344, Ch for another example of an orally communicated half-secret trust being enforced. These seriously undermine the incorporation by reference argument.
[148](1886) 2 TLR 660,
[149] (1849) 3 De G & Sm 525, 64 ER 590.
[150]ibid 547.
[151]ibid.
[152]ibid 548.

enforce the half-secret trusts for the prevention of fraud should sufficient evidence of communication have been established.

In *Re Fleetwood,*[153] a properly communicated half-secret trust was enforced. Hall VC, quoting directly from an Irish case, *Riordan v Banon*[154] made it clear that half-secret trusts are enforced to prevent fraud on the testator, stating that:

> the instruments of fraud [principle], appears to me to apply to cases where the will shews some trust was intended, as well as to those where this does not appear upon it. The testator, at least when his purpose is communicated to and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise.[155]

He also described half-secret trusts as being created 'by communication',[156] which is consistent with the fraud theory, as well as pointing out that were the half-secret trust not to be enforced, 'the residuary legatees would stand to profit from B's fraud'.[157] Finally, Hall VC held that one of the secret beneficiaries could not take her interest because she had witnessed the will.[158] Although this suggests that the half-secret trust was considered to be part of the testamentary disposition and was thus

[153](n 74).
[154](1876) 10 Ir Eq Rep 649.
[155](n 74) 607.
[156]ibid 604.
[157]That equity will not allow one man to profit from another's fraud (the rule in *Huguenin v Baseley (*1807) 14 Ves Jun 273, 33 ER 526) is a long-standing principle that has been invoked several times in secret trusts cases. (e.g. in *Tee v Ferris* (n 112) 367 (Page Wood VC); *Blackwell* (n 42) 241 (Lord Warrington)).
[158]Presumably due to s15 of the Wills Act 1837.

incorporated into it,[159] Hall VC's unequivocal comments regarding fraud demonstrate otherwise.

In summary, the weight of authority from the nineteenth century favours the view that the fraud theory applies to half as well as to fully secret trusts, notwithstanding academic opinions to the contrary. This argument is considerably reinforced when these cases are read in the light of the fully secret trust cases from the period, in which fraud was consistently explained as not requiring any personal gain. On the other hand, by the end of the nineteenth century, no half-secret trust had actually been enforced under the incorporation by reference principle or indeed for any reason other than to prevent the statute being used as an instrument of fraud.

2.3.4.4 Authorities from the twentieth century

2.3.4.4.1 Fully secret Trust cases

During this period, the fraud on the testator justification was endorsed several times, including three times by the majority in the Court of Appeal.[160]Furthermore, in *Re Stead*,[161] a secret trust was enforced to prevent fraud on the testator. Farwell J saw no contradiction in citing *McCormick* as authority that secret trusts can only be enforced 'in clear cases of fraud'[162] whilst affording 'the fullest credit to [B] for desiring to speak the truth'[163]. It is also notable that in *Tharp v Tharp,*[164] Neville J

[159]This was included in the argument of Matthews, 'The True Basis' (n 46) 385-367, as was Hall VC's use of the word 'incorporated', (n 74) 608. This unfortunate choice of words cannot, when the judgment is read as a whole, be taken literally to mean that half-secret trusts are incorporated into the will by reference.
[160]See *Re Pitt-Rivers* [1902] 1 Ch 403, CA, 407 (Vaughan Williams LJ with whom Stirling LJ and Cozens-Hardy LJ concurred); *Re Maddock* [1902] 2 Ch 220, CA, 225 (Collins MR) and 227 (Stirling LJ); *Re Gardner (No 1)* [1920] 2 Ch 523, CA ,530 (Warrington LJ) and 534-535 (Younger LJ).
[161] (n 47).
[162]ibid 241.
[163]ibid 240.
[164][1916] 1 Ch 142, Ch.

applied the doctrine of secret trusts to an analogous situation,[165] explaining that 'a subsequent action by [B] in contradiction of what he promised is a fraud' and that 'he should not, either for himself or for anybody else, take advantage of the fraud that he had committed.'[166]

Nevertheless, the cases from the twentieth century do not manifest the same consistency of reasoning as is found in their nineteenth century counterparts. Perhaps the seeds of uncertainty were sown in the 1920s and 1930s. In *Re Maddock,*[167] Cozens-Hardy LJ, although in the minority on this point, professed uncertainty as to whether the doctrine of secret trusts was based on 'trust, or contract, or estoppel'.[168] In *Re Gardner (No 1),*[169] Lord Sterndale, stated that B:

> takes the property in accordance with and upon an undertaking to abide by the wishes of [A], and if he were to dispose of it in any other way he would be committing a breach of trust, or as it has been called in some of the cases a fraud. I do not think it matters which you call it. The breach of trust or the fraud would arise when he attempted to deal with the money contrary to the terms on which he took it.[170]

Nevertheless, in both *Re Falkiner*[171] and *Re Williams*,[172] the justifications for the enforcement of secret trusts were explained in the same terms as those of Lord

[165]At the insistence of the defendant, the testator destroyed a codicil that had revoked a power of appointment. He did this in reliance on the defendant's assurance that he would not exercise the reinstated power of appointment to the prejudice of the defendant. Neville J found in favour of the plaintiff, although the parties eventually settled.
[166](n 164) 151-152.
[167](n 160).
[168]ibid 232 (Cozens-Hardy J).
[169](n 160).
[170]ibid 529 (Lord Sterndale MR).
[171][1924] 1 Ch 88 Ch.
[172][1933] Ch 244, Ch..

Sterndale, but without specific mention of the word 'fraud'. *Williams* was the last case for several decades which concerned fully secret trusts. The cases discussed in this paragraph would seem, therefore, to mark the point at which the centuries-old continuity in judicial reasoning in respect of fully secret trusts came to an end.

In two relatively recent cases, misconceptions regarding Lord Westbury's judgment in *McCormick* led to unnecessary questions being asked regarding the standard of proof required in secret trust cases. In *Ottaway v Norman,*[173] Brightman J, whilst accepting that the fraud in question is fraud on B[174] interpreted Lord Westbury's comments regarding the need for clear evidence of fraud[175] as meaning that, in secret trusts cases, the standard of proof is 'perhaps analogous to the standard of proof which this court requires before it will rectify a written instrument'[176]. He enforced the secret trust without further reference to the standard of proof, however, so his comments should not be taken to be an accurate reflection of the law.[177]

In *Snowden,*[178] Megarry VC based his judgment on the orthodox interpretation of Lord Westbury's speech in *McCormick*, i.e. that fraud, for the purposes of justifying the enforcement of secret trusts, must involve personal gain by B. Having stated that secret trusts can be enforced in the absence of fraud,[179] he concluded, on the basis of Lord Westbury's comments, that in secret trust cases where fraudulent enrichment is possible, a high standard of proof ought to be applied, and that in all other secret

[173](n 41).
[174]ibid 709-711.
[175](n 66) 97.
[176](n 41) 712.
[177]Brightman J's comments regarding the adoption into English law of the 'floating trust', based on *Birmingham v. Renfrew* (1937) 57 CLR 666 ought similarly to be disregarded, as they were, again, speculative and have not been followed.
[178](n 61).
[179]ibid 536.

trust cases, the ordinary civil standard should apply because this latter class of cases has nothing to do with fraud.[180] If Megarry VC's take on the doctrine of secret trusts is to be accepted, it must also be accepted that in 1869, not only did Lord Westbury propose a new definition of fraud, he also introduced an especially high standard of proof in cases where this fraud was present, and that both of these changes went unnoticed by the courts, even the House of Lords,[181] for over a century. It is thus suggested that academic arguments or judgments relying on Megarry VC's comments ought to be reassessed.

2.3.4.4.2 Half-secret trust cases

The enforceability of half-secret trusts and the correctness of *Fleetwood* were, without reasons being offered, called into question at first instance in *Re Huxtable*[182] and *Re Hetely*.[183] In the former, the half-secret trust was reluctantly enforced and, in the latter, *Fleetwood* was distinguished. Despite this inauspicious start, perhaps the most important case concerning secret trusts, and one of the most significant of all authorities concerning parol agreement trusts, is from this period. *Blackwell v Blackwell*[184] represents the most complete House of Lords analysis of the principles governing secret trusts. A half-secret trust, which had been properly communicated and accepted,[185] was unanimously upheld for the prevention of fraud. The view that fraud must involve B gaining personally was rejected outright. Lord Buckmaster observed that if either a fully or a half-secret trust is not performed, '[C is] equally

[180] ibid.
[181] See *Blackwell* (n 42).
[182] [1902] 1 Ch 214, Ch.
[183] [1902] 2 Ch 866, Ch.
[184] (n 42).
[185] i.e. before the execution of the will.

defrauded in both cases, and the faith on which [A] relied is equally betrayed'.[186] Lord Warrington explained the fraud in similar terms, describing a secret trust as 'arising from the acceptance by [B] of a trust, communicated to him by [A], on the faith of which acceptance the will was made or left unrevoked, as the case might be',[187] so that 'it would be a fraud on the part of [B] to refuse to carry out the trust'.[188] Here, it can be observed that both of their Lordships emphasised that A's reliance on B's undertaking is a key element. Lord Warrington also observed, echoing the comments of Lord Hardwicke in *Reech*[189] that 'if it would be a fraud on the part of [B] to refuse to carry out the trust, the residuary legatees cannot take advantage of and thus make themselves parties to such fraud.'[190]

Finally, Viscount Sumner was unequivocal in endorsing the fraud theory, stating that the enforcement of half-secret trusts is 'justified by the same considerations as in the cases of fraud and absolute gifts'.[191] He also stated, quoting Lord Cairns,[192] that:

> for the .... prevention of fraud, it engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude, in order to prevent [B] from applying property to a purpose foreign to that for which he undertook to hold it.[193]

It is strange that doubts as to why half-secret trusts, and also fully secret trusts, are

[186] (n 42).
[187] ibid 341.
[188] ibid. Lord Warrington also reiterates this point at 341.
[189] (n 75).
[190] *Blackwell* (n 42) 341.
[191] ibid 335.
[192] In *Jones v Badley* (n 97).
[193] *Blackwell* (n 42) 336.

enforced have persisted since *Blackwell.* Indeed, the enforcement of half-secret trusts has been expressly attributed to the prevention of fraud three times[194] since 1929. It has to be asked why a unanimous House of Lords judgment which is consistent with the overwhelming majority of other authorities has been so frequently called into question, and why the myth that equitable fraud must involve personal gain has proven so persistent.

2.3.4.5 Authorities from the twenty-first century

There is little consistency in reasoning amongst the few authorities concerning secret trusts from this century.[195] Megarry VC's view that fraud must involve deliberate personal gain, and that secret trusts can be justified without reference to fraud, has recently been followed twice[196] in the tribunal courts. Furthermore, in *Kasperbauer v Griffith,*[197] in the Court of Appeal, Peter Gibson LJ stated, in terms similarly vague to those used in *Falkiner* and *Williams*, that, in secret trusts cases, 'equity acts to prevent fraud or other unconscionable conduct'.[198] It is suggested that Peter Gibson LJ's comment is not supportable; as has been demonstrated in the above analysis there is not a single instance of a secret trust actually being enforced to prevent any 'unconscionable conduct' other than fraud. Furthermore, the instances of the term 'unconscionable' being used in preference to 'fraud' are vanishingly rare.

An important and interesting case which is often overlooked as an authority

[194]*Re Keen* (n 146) 244 (Lord Wright MR, with whom Romer LJ and Greene LJ concurred); *Re Cooper* [1939] Ch 811 815 (Green MR, with whom Clauson LJ and Goddard LJ concurred); *Young* (n 147) 349 (Dankwerts J).
[195]Although the recent case of *Re Freud* [2014] EWHC 2577 (Ch), [2014] WTLR 1453, shows the relevance of the doctrine of secret trusts to the modern law. The justifications for the enforcement of secret trusts were not in issue and not discussed.
[196]*Taylor* (n 64); *Davies* (n 64).
[197][2000] 1 WTLR 333, CA.
[198]ibid [27].

concerning secret trusts is *Healey v Brown*.[199] Mrs Brown (A) and Mr Brown (B) executed mutual wills by which each left his/her entire estate to the survivor. Each will provided that the survivor would not 'amend or revoke' his or her will after the other spouse's death. A and B were joint tenants of a long leasehold estate. According to the mutual wills, the survivor would bequeath this estate in the land to C. When A died, by virtue of the right of survivorship, B became sole owner of the leasehold estate. B then transferred the land into the names of himself and his son (the defendant) as joint tenants. When B died, the defendant, again pursuant to the right of survivorship, became the sole legal owner of the flat. C claimed that the defendant held the leasehold estate on trust for her. The doctrine of mutual wills provided the basis for C's claim. Donaldson QC, sitting as Deputy High Court Judge, held that the doctrine of mutual wills was inapplicable because there was no contract entered into between A and B which satisfied the Law of Property (Miscellaneous Provisions) Act 1989, s2. B was therefore free to do as he wished with the share in the land which had been his originally. Accordingly, the defendant took that share free of any constructive trust for C. In respect of the interest in the land which had passed from A to B upon A's death, however, Donaldson QC invoked the principles relating to secret trusts. He explained that, in secret trust cases, 'a claimant's interest in such a case does not derive from contract, but turns rather on the acceptance of a trust by the recipient and avoidance of a fraud on the beneficiary and testator'.[200] Because B had received A's interest subject to a parol agreement that B would bequeath it to C, B took A's share on constructive trust for C. This constructive trust bound the defendant. C was hence entitled to a 50% beneficial interest in the land.

[199][2002] WTLR 849.
[200]ibid [28].

Healey is important as a relatively recent case in which the prevention of fraud on A and C was accepted as the justification for the enforcement of secret trusts. This shows that, despite some recent aberrations, the long-standing conception of equitable fraud is alive and well in the twenty-first century. *Healey* also demonstrates that the doctrine of secret trusts is continuing to evolve, for it is the first case in which a secret trust has been held to bind a party who received the secret trust property through the operation of the right of survivorship upon the death of his joint tenant. *Healey* further shows the adaptability of the doctrine of secret trusts because even though neither A nor B intended to create a clandestine trust, the requirements for the creation of a secret trust had nevertheless been satisfied.

2.3.5 Do the differing communication requirements for fully and half-secret Trusts undermine the fraud theory?

The rule that half-secret trusts must be communicated before or contemporaneously with the will's execution has generated much controversy. Numerous justifications for its existence have been proposed, and several commentators have used the rule as the cornerstone of their assertions regarding the justifications for the doctrine itself.[201] In fact, the rule is simply the result of policy decisions. In *Blackwell,* Viscount Sumner stated that a half-secret trust could not be enforced if communicated after the will's execution; this would be tantamount to allowing a testator to 'reserve to himself a power of making future unwitnessed dispositions [and thus to] "give the go-by" to the requirements of the Wills Act.'[202] Put another way, whereas Viscount Sumner considered the enforcement of properly communicated secret trusts to be in

[201]See particularly Matthews, 'The True Basis' (n 46); Perrins, 'Secret Trusts' (n 46); D Wilde 'Secret and Semi-Secret Trusts: Justifying the Distinctions between the two' [1995] Conv 366.
[202](n 42) 339.

accordance with the legislature's intention, he considered that Parliament did not intend half-secret trusts communicated after the will to be enforceable,[203] apparently because the will in such cases serves as an overt statement by A that although he has made his will, he still intends to alter by parol the final destination of legacies bequeathed under it.

Viscount Sumner saw no contradiction between interpreting the effect of the Wills Act thus and attributing the enforcement of secret trusts to the prevention of fraud, nor is any such contradiction suggested in any of the other authorities.[204] This is unsurprising because even if the non-performance of a half-secret trust communicated and accepted after the execution of the will amounts to a fraud on A, it has been held on several occasions that the enforcement of such half-secret trusts is against the policy of the Wills Act. Thus, from a constitutional standpoint, equity is powerless to intercede to prevent any such fraud. An analogy may be drawn with the Mortmain cases. In many such cases,[205] the court accepted that B took subject to a mandatory obligation to perform the secret trust because any non-performance would amount to a fraud on A. This mandatory obligation upon B also amounted to an illegal devise, however, and the property was returned to A's estate by resulting trust. Again, because of the manner in which legislation was interpreted by the judges, equity was powerless to intercede to prevent the fraud on A.

[203]See also *Johnson* (n 142); *Hetely* (n 183)*; Keen* (n 146). The rule was also applied in *Re Bateman's WT* [1970] 1 WLR 1463, Ch.

[204]In particular, in *Re Keen* (n 146), the fraud theory and the communication requirement were accepted, by the Court of Appeal

[205]E.g. *Boson v Statham* (1760) 1 Cox 16, 29 ER 1041; *Russell v Jackson*, (n 99). See above (n 93) for an explanation of the relevance of the Mortmain Act.

2.3.6 Summary of the observations on the nature of equitable fraud in secret trust cases

As *Healey* shows, the consistency of the judiciary in relation to the nature of the fraud continues until the present day. The very small number of cases containing conflicting statements, most of which are relatively recent, can only sensibly be dismissed as being anomalous. As it is abundantly clear from the authorities that equitable fraud need not involve personal gain, the idea that fraud can be prevented by the imposition of a resulting trust in favour of A's estate, and that therefore the fraud theory cannot explain why the secret trust should actually be enforced, ought to be disregarded, as should concerns regarding the standard of proof to be applied. It is equally clear that all secret trusts are justified on the same principles. There is insufficient evidence from the case law to support assertions that half-secret trusts are incorporated into the will by reference or are enforced for any other reasons. Similarly, arguments that fraud on A is not a strong enough type of fraud to explain equity's intervention,[206] and that there is a lack of clarity in the judgments regarding that nature of fraud[207] are not borne out by the authorities. The fraud which causes equity's intervention arises if B's promise to perform the trust, upon which A relied when executing his testamentary dispositions, is not performed. Adoption of any other notion of fraud would involve overturning not only several centuries of jurisprudence, but also three House of Lords decisions. A final point to note is the striking similarities in the reasoning of the courts in the vast majority of secret trusts cases and the category one parol agreement trusts cases. Most significantly, the lack of any need to prove any deliberate intention by B to deceive, or any personal gain by B in the event of his reneging on the parol agreement, and the insistence that the

[206]See Critchley, 'Instruments of Fraud' (n 44).
[207]See McFarlane, 'Constructive Trusts' (n 46) 676.

fraud lies in any deviation by B from what he agreed and what A relied upon, are common threads running through the case law in respect of both types of trusts.

2.3.7 Observations on the nature of equitable fraud in cases of inter vivos category two parol agreement trusts

Perhaps the most significant case in this category is *Staden v Jones,*[208] in which the Court of Appeal unequivocally upheld C's claim. A and B, who were co-owners of the matrimonial home, agreed that, upon their divorce, A would transfer her share in the land to B so long as B would ensure that the share eventually passed to C, their infant daughter. Some years after obtaining the transfer, B remarried, and later transferred the property into the joint names of himself and his new wife as equitable joint tenants. B died intestate, and C sought to claim a 50% beneficial interest in the property from B's wife. There was no evidence that B had obtained A's interest with the intention of retaining it for himself, or that B's wife had behaved dishonestly. Nevertheless, it was held that B's wife held a 50% beneficial interest on trust for C. The basis of the judgment was the prevention of fraud, which was explained in exactly the same terms as in *Bannister*,[209] and it was held that s53(1)(b) could not be used as an engine for such fraud.[210]

Another recent Court of Appeal case in this category is *De Bruyne v De Bruyne*.[211] Here, the trustee of a discretionary trust which comprised of, *inter alia,* some valuable shares, had a power of appointment which empowered him, with the consent of a particular beneficiary, to distribute all income and capital to any persons

[208](n 60).
[209]See above, text to n 24. These words were directly quoted in *Staden*, (n 60) [30] Arden LJ in support of the judgment.
[210]ibid.
[211](n 60).

within the class of beneficiaries. The adult beneficiaries, who wished to dissolve the trust, decided that the most expedient means by which to achieve this aim was through the trustee exercising the power. It was agreed that the trustee would distribute the shares to one of the beneficiaries, so long as the beneficiary in question would ensure that they would be held on trust for the benefit of his children. Essentially, then, the trustee and the beneficiary whose consent was required can be regarded as A, the beneficiary to whom the shares were transferred is B, and the children are represented by C. When a dispute later arose as to the beneficial ownership of the shares, the Court of Appeal ruled in favour of C. Patten LJ, with whom Thorpe LJ and Kennedy LJ agreed, held that a constructive trust arose in favour of C. Such trusts, according to his Lordship:

> concentrate… on the circumstances in which the transferee came to acquire the property in order to provide the justification for the imposition of a trust. The most obvious examples are secret trusts and mutual wills in which property is transferred by will pursuant to an agreement that the transferee will hold the property on trust for a third party. In neither case does the intended beneficiary rely in any sense on the agreement (he may not even be aware of it) but, in both cases, equity will regard it as against conscience for the owner of the property to deny the terms upon which he received it. It is not necessary in such cases to show that the property was acquired by actual fraud (although the principle would apply equally in such cases). The concept of fraud in equity is much wider and can extend to unconscionable or inequitable conduct in the form of a denial or refusal to carry out the agreement to hold the property for the benefit of the third party which was the

> only basis upon which the property was transferred. This is sufficient in itself to create the fiduciary obligation and to require the imposition of a constructive trust. The principle is a broad one and applies as much to inter vivos transactions as it does to wills: see *Rochefoucauld v Boustead…*; *Bannister v Bannister*.[212]

Several very interesting points for discussion arise out of Patten LJ's observations. Firstly, his Lordship's acceptance of the prevention of fraud as the underlying reason for the imposition of the trust, as well as his description of the nature of equitable fraud, are very much in keeping with the findings thus far in this thesis. It is also interesting to note that Patten LJ regarded all category two parol agreement trusts (i.e. secret trusts and trusts such as that in *De Bruyne*), as well as category one parol agreement trusts and the trust in *Rochefoucauld*, as being enforced pursuant to the same justifications. This strengthens the conclusions reached thus far in this thesis. It should also be observed that *De Bruyne* is unusual for not involving land. Section 53(1)(b) of the Law of Property Act was thus irrelevant to its enforcement. There was evidently no enforceable express trust, however, because B's promise that he would take the shares as trustee was made prior to his obtaining sufficient title to declare a trust of the shares. A final point to note is that Patten LJ's treatment of parol agreement trusts and mutual wills as being doctrinally similar will be covered below, at 5.4.

A final case to consider in this section is *Rudkin v Dolman*.[213] Here, A conveyed land

[212]ibid [51].
[213](1876) 35 LT 791. This has been cited as an authority that cases in this section should be resolved by the imposition of a resulting trust in favour of A rather than a constructive trust in favour of C- see JD Feltham 'Informal Trusts and Third Parties' [1987] Conv 246.

to B. It might have been A's intention that B should take as trustee for C; after having taken the conveyance, B executed a deed stating this to have been the case. When a dispute later arose as to the beneficial ownership of the land, it was held that B had taken as resulting trustee for A. As has been pointed out,[214] however, the court did not find that A and B ever entered into any parol agreement. *Rudkin* therefore provides support for one of the contentions which might tentatively be made at this stage of this thesis, i.e. that constructive trusts imposed for the prevention of the type of fraud in aid of which a statute may not be used will only arise when there has been a parol *agreement* which has been relied upon.

2.3.8 The classification of category two parol agreement trusts

As has been seen, there is little doubt from the authorities that *inter vivos* category two parol agreement trusts are regarded by modern courts as constructive trusts. The same certainty is not, however, manifest in the cases concerning secret trusts. This section of the chapter will, therefore, deal with the enduringly controversial question of how secret trusts should be classified. It has been argued that all secret trusts are express trusts,[215] that all secret trusts are constructive trusts,[216] that fully secret trusts are constructive and half-secret trusts are express,[217] and that all secret trusts can properly be regarded as either express or constructive.[218] Inextricably bound to the question of how best to classify secret trusts is the further question of the extent to which secret trusts are *dehors* the will. Again, academic views differ wildly on this point. Some commentators insist that, if the fraud theory is correct,

[214]TG Youdan, 'Informal Trusts and Third Parties: a Response' [1988] Conv 267.
[215]Hodge, 'Secret Trusts' (n 44) 346.
[216]McFarlane, 'Constructive Trusts' (n 46).
[217]Sheridan, 'English and Irish Secret Trusts' (n 46); Andrews, 'Creating Secret Trusts' (n 46).
[218]Glister and Lee, *Modern Equity* (n 44) 163.

secret trusts must be express testamentary trusts which are not *dehors* the will,[219] whilst others have asserted that secret trusts must be express trusts if they are *dehors* the will.[220] On the other hand, it has also been suggested that secret trusts are outside of the scope of the Wills Act because they are constructive trusts arising for reasons other than the prevention of fraud.[221] This part of the thesis will thus examine the extent to which secret trusts are *dehors* the will with a view to establishing whether they are best classified as express or constructive trusts.

2.3.8.1 Secret trusts are *dehors* the will

Although it is submitted here that it should be regarded as beyond doubt that the secret trusts are enforced on the basis of the instrument of fraud principle, it is also apparent from the authorities that secret trusts are *dehors* the will and enforced in a way that does not conflict with the Wills Act. This point was made by Viscount Sumner in *Blackwell* who, in addition to being unequivocal in attributing the enforcement of secret trusts to the prevention of fraud, said that he could 'not see how the statute-law relating to the form of a valid will is concerned at all'[222] with the enforcement of secret trusts. In fact, although this is at odds with the majority of academic opinion, there are numerous examples throughout the case law of express or implied references to secret trusts being *dehors* the will by judges endorsing the fraud theory.[223]

[219]Hodge, 'Secret Trusts' (n 44) 346.
[220]Critchley, 'Instruments of Fraud' (n 44).
[221]McFarlane, 'Constructive Trusts' (n 46).
[222](n 42) at 334.
[223]See, for example, *Sweeting* (n 47); *Re Spencer's Will* (1881) 51 LJ Ch 271; *Re Keen* (n 146); *Re Young* (n 147); *Ottaway v Norman* (n 41).

2.3.8.1.2 What is a testamentary disposition?

Many of the debates regarding the relevance of s9 to the doctrine revolve around the question of whether secret trusts are testamentary dispositions, in which case they are exceptions to the Wills Act,[224] express *inter vivos* dispositions, in which case s9 is irrelevant to questions regarding their enforcement,[225] or constructive trusts[226]. Before proceeding, therefore, the meaning of s9 should be reconsidered. The section states that 'no will shall be valid' unless it is in writing and signed by A in the presence of two or more attesting witnesses. The meaning of the term 'will' is described in s1 as extending to 'a testament, and to a codicil... and to any other testamentary disposition'. Thus, the term 'testamentary disposition 'is synonymous with the term 'will'. The meaning of s9 is that all valid testamentary dispositions must be executed in accordance with the formality requirements. Any attempt to dispose of property upon death that does not comply with s9 shall not be valid and therefore cannot correctly be referred to as a testamentary disposition. In other words, s9 regulates *attempts* at making testamentary dispositions. Actual testamentary dispositions by their very nature satisfy s9. So, to state that a secret trust is not a testamentary disposition is a statement of the obvious. This does not necessarily mean that the Wills Act is irrelevant to questions regarding its enforcement.

This narrow definition of 'testamentary disposition' is not widely accepted.[227] A wider definition that has been proposed is that any ambulatory and revocable disposition that is enforced is a testamentary disposition, regardless of whether it appears on

[224]See especially Critchley, 'Instruments of Fraud' (n 44).
[225]See especially Pearce and Stevens, *The Law of Trusts* (n 44) 224-229.
[226]See especially Sheridan, 'English and Irish Secret Trusts' (n 46); A Andrews, 'Creating Secret Trusts' (n 46); 'Constructive Trusts' (n 46); Hudson, *Equity and Trusts* (n 50).
[227]See especially Critchley, 'Instruments of Fraud' (n 44).

the document commonly referred to as the 'will',[228] and regardless of whether it is admitted to probate. Such 'testamentary dispositions' are regulated by s9. By this definition, a secret trust is a testamentary disposition which is enforced as an exception to the Wills Act.

In order to answer the difficult questions[229] surrounding the position of secret trusts *vis a vis* the statutory formality requirements of the Wills Act, the creation and enforcement of secrets trust will be examined in detail. Accordingly, the awkward and controversial questions concerning the extent to which A's declaration of trust is a testamentary disposition will be considered, followed by analysis of whether the secret beneficiary acquires his or her beneficial interest through the operation of a testamentary disposition.

2.3.8.1.3 A's declaration of trust is not a testamentary disposition

There is a strong judicial consensus that A's declaration of trust is not a testamentary disposition. In *Chamberlain v Agar*,[230] in which a fully secret trust expressed in writing was upheld, the Vice Chancellor stated that 'no Paper exists, that can be properly described as a Will, Codicil, or testamentary Paper'.[231] Similarly, in *Smith v Attersoll,*[232] it was held that the paper containing the details of the half-secret trust was 'not to be considered testamentary',[233] and in *Briggs v Penny,*[234] of four papers containing the details of purported half-secret trusts, Knight Bruce VC said that 'not

[228]See especially Critchley, ibid 634.
[229]For examples of debates on this, see especially Holdsworth, above n. 9; Critchley, 'Instruments of Fraud' (n 44); Kincaid, 'The Tangled Web' (n 50); Challinor, 'Debunking the Myth' (n 44).
[230](n 95).
[231]ibid 263.
[232](n 136).
[233]ibid 270-271.
[234](n 149).

one can… be treated or considered as testamentary. If any one of them is valid at all, it can only be deemed valid in some other character than as a testamentary instrument'.[235] This is consistent with the view of Stuart VC in *Lomax v Ripley,*[236] who made it clear that papers containing details of purported secret trusts did not 'have a testamentary character'[237] because they could not have been 'admitted to probate'.[238] Likewise, in *Re Maddock,*[239] Collins MR referred to the written terms of the secret trusts as 'collateral non-testamentary document[s]',[240] and in *Re Bateman's WT,*[241] Pennycuick VC described a clause in A's will purporting to create a half-secret trust as 'an attempt to dispose of the estate by a nontestamentary instrument'.[242] Finally, in *Re Cooper,*[243] Greene MR dismissed the argument that half-secret trusts should be incorporated into the will as an argument for 'incorporating by reference into the testamentary dispositions of A the trusts actually declared to his trustees'.[244] Clearly, he did not regard the declarations of secret trusts as testamentary dispositions. Significantly, there is not one case in which A's declaration of trust is described as being a testamentary disposition.[245] What is also apparent from these authorities is that by 'testamentary disposition', the judges concerned were referring to the narrow definition of the term, i.e. A's will and anything incorporated therein, as opposed to the wider definition.

[235] ibid 527.
[236](n 120).
[237]ibid 76.
[238]ibid.
[239](n 160).
[240]ibid 224.
[241](n 203).
[242]ibid 1468.
[243](n 194).
[244]ibid 819.
[245]*Maddock* (n 160) has been cited as authority that secret trusts are testamentary dispositions (e.g. by Challinor, 'Debunking the Myth' (n 44). In fact, the secret trusts were merely *treated as part of the testamentary disposition* for the purposes of the litigation.

The next question is whether s9 applies to A's declaration of trust. The most instructive cases are those which deal with uncommunicated secret trusts which are, of course, void. The reason for this is that A's declaration of trust does not comply with the Wills Act. The leading case on this rule is *Wallgrave v Tebbs,*[246] in which Page Wood VC refused to enforce the uncommunicated secret trust on the grounds that it is 'impossible for the Court to look upon a document which is excluded by the statute'.[247] Similarly, in *Moss v Cooper,*[248] the same judge explained that 'if you attempt to raise a trust out of some uncommunicated intention, you contravene the express provisions of the statute by varying the dispositions of the will by parol evidence'.[249] In *Briggs v Penny,*[250] it was also held by Knight-Bruce VC that A's papers were not admissible as evidence as 'the statute of 1837 seems to me to exclude them'.[251] The requirements of communication and acceptance have frequently been reaffirmed, including by the House of Lords.[252]

These authorities reaffirm that the narrow definition of testamentary disposition is the correct one, as they are direct authorities that the Wills Act does apply to the declaration of secret trust, even though it has been repeatedly held that such a declaration is not a testamentary disposition. Thus, assertions that secret trusts are enforceable as express *inter vivos* trusts, to which the Wills Act has no application,[253] would seem to be unsustainable. Express *inter vivos* trusts are unilateral[254] and

[246](n 43).
[247]ibid 326. See also *Tee v Ferris* (n 112) 366 (Page Wood VC); *Whitton v Russell* (n 88) 449 (Lord Hardwicke LC).
[248](1861) 1 J & H 352, 70 ER 782.
[249]ibid 366.
[250](n 149).
[251]ibid 547.
[252]See *McCormick* (n 66); *Blackwell* (n 42).
[253]For examples, see above (nn 53 and 54).
[254]For a comprehensive list of theoretical reasons why secret trusts are not express, see R Burgess, 'The Juridical Nature of Secret Trusts' NILQ 263.

need not comply with statutory formality requirements for valid wills.[255] A's declaration of secret trust is affected by the statutory formality requirements, and the secret trust can only be given effect if A's declaration is communicated to and accepted by B. Classifying a secret trust as an express *inter vivos* trust is contrary to both principle and the authorities. Perhaps the reason why the classification of secret trusts as express *inter vivos* trusts has endured is that it seems to be presumed that, if the declaration of secret trust is not a testamentary disposition, then it must be an *inter vivos* disposition.[256] In fact, the declaration of secret trust has no effect due non-compliance with the Wills Act. It is plainly inaccurate to describe as an *inter vivos* disposition that which is not a disposition at all.

Although not a disposition, the declaration of secret trust by A has been described as being 'in furtherance of the testamentary dispositions',[257] and, in *Blackwell,* Lord Buckmaster referred to the declarations of secret trusts as 'testamentary intentions',[258] as did Vaughan Williams LJ in *Re Pitt-Rivers.*[259] It is therefore submitted that A's declaration of trust is best described as an expression of his testamentary intentions.

2.3.8.1.4 C does not acquire his interest by the operation of a testamentary disposition

It would seem self-evident that if A's declaration of secret trust is not a testamentary

[255]They should, of course, comply with statutory formality requirements for *inter vivos* trusts (see Law of Property Act 1925, s53(1)(b)).
[256] E.g. Pearce and Stevens, *Law of Trusts* (n 44) 224-229.
[257]*Johnson* (n 142) 91 (Parker VC).
[258](n 42) 325.
[259](n 160) 407.

disposition, then the interest that C takes cannot be part of a testamentary disposition either. This is indeed the case, as several authorities demonstrate. The starting point is the House of Lords judgment of *Cullen v Attorney-General for Ireland,*[260] in which it was held that a secret trust was not a testamentary disposition and did not therefore qualify for a certain taxation exemption.[261] Although this case has been dismissed as 'a policy decision',[262] it deserves closer attention. Lord Westbury described the title claimed by C as 'a title *dehors* the will, and which cannot be correctly termed testamentary',[263] and Lord Chelmsford reached a similar conclusion.[264] In *Re Young,*[265] it was held that C could take his interest, even though he had witnessed A's will.[266] Although s15 of the Wills Act renders void any disposition by will to a person who has been a witness to that will, it was held that 'a beneficiary under a secret trust does not take under the will, and that he is not, therefore, affected by s15'.[267] This is further authority that the C's interest is not bestowed upon him or her by way of a testamentary disposition. These authorities are entirely consistent with the narrow definition of testamentary disposition;[268] by this definition, it is obvious, despite numerous assertions to the contrary,[269] that secret trusts are not enforced as testamentary dispositions for the simple reason that they does not appear in full in the will. Thus, as well as it being impossible that secret trusts are enforced as express *inter vivos* trusts, it can also be seen that that they

[260](n 66).
[261]The wording of the Stamp Acts in question (5 & 6 Vict C 82 s38 and 8 & 9 Vict C 76 s4) stated that the exemption from duty applied to 'a gift by any will or testamentary instrument'.
[262]Critchley, 'Instruments of Fraud' (n 44) 641.
[263]*Cullen* (n 66) 198.
[264] ibid 197-198.
[265](n 147).
[266]Section 15 of the Wills Act renders void any disposition by will to a person who has been a witness to that will void.
[267](n 267) 351.
[268]See also *Re Keen* (n 146) 244 (Lord Wright).
[269]See, for example, Hodge, 'Secret Trusts' (n 44); Wilde, 'Secret and Semi-Secret Trusts' (n 201); Critchley, 'Instruments of Fraud' (n 44); McFarlane and Mitchell, *Hayton & Mitchell* (n 15) 115.

are not express testamentary trusts either.[270]

2.3.8.2 Are secret trusts dehors the will because they are express trusts, or because C's interest is acquired by a trust imposed for the prevention of fraud?

It is well established that secret trusts must be communicated to and accepted by B in order for C to acquire an interest on the death of A.[271] It is as a result of the communication and acceptance of the secret trust obligation that, at the time of A's death, B's conscience is affected[272]. This would seem to be consistent with the classification of a secret trust as a trust which is imposed on B because any deviation from his promise would amount to a fraud, rather than as an express trust. Notably, although there are no references to constructive trusts in any of the pre-twentieth century cases, there are many authorities which suggest that secret trusts are trusts born out of equity's jurisdiction to declare a party to be a trustee, rather than express trusts created by a settlor. In *Stickland v Aldridge,*[273] Lord Eldon stated that, in cases of secret trusts, 'though within the intention [of the legislature] it cannot be said a trust is declared under these circumstances, it is clear, a trust would be created, upon the principle, on which this Court acts, as to fraud'.[274] Similarly, in *Lomax*[275] Stuart VC explained that secret trusts may only be enforced if it is possible to 'prove by evidence a trust expressed, or such an engagement by words or by silence as would authorize the Court to say that [B] undertook to do that which

[270]Both Hodge, 'Secret Trusts' (n 44) and Wilde, 'Secret and Semi-Secret Trusts' (n 201) apparently classify secret trusts as express testamentary trusts.
[271] See, however *Re Gardner (No 2)* [1923] 2 Ch 230, Ch, which appears to indicate that some sort of beneficial interest may pass prior to the testator's death. There are, however, inconsistencies in Romer J's judgment (especially at 232-233), which is contrary to other authorities and appears to expressly contradict the earlier Court of Appeal judgment of *Maddock* (n 160).
[272]See 2.3.1, above, for authorities regarding the requirements for communication and acceptance.
[273](n 94).
[274]ibid 519.
[275](n 120).

prevented the devisor from imposing upon her an express trust'.[276] Lord Westbury expressed similar views in *McCormick,* stating that equity 'imposes upon [B] a personal obligation, because he applies the Act as an instrument for accomplishing a fraud'.[277] The same view was echoed in *Re Spencer's Will.*[278] Cotton LJ stated that in alleged secret trust cases:

> parol evidence is to be produced for the purpose of showing that there were circumstances which induced [A] to make this bequest, and which would enable the court to fasten upon [B] an obligation or trust… [and that] without creating an express declaration of trust... under the circumstances, implies an obligation of performing the wishes of A which A had relied upon their performing as a ground for giving the legacy.[279]

Another illuminating judgment is that of Kay J in *Re Boyes,*[280] who said that in cases of valid secret trusts, 'the Court has compelled discovery and performance of the promise, treating it as a trust binding the conscience of [B], on the ground that otherwise a fraud would be committed'.[281] Similarly, in *Re Pitt-Rivers,*[282] Vaughan Williams LJ described the C's interest as being 'created by the giving by [B] of a promise which it would be unconscientious for [B] not to perform'[283] (as opposed to being created by A's declaration of trust). In *Blackwell,* Lord Warrington described a secret trust in similar terms, as 'arising from the acceptance by [B] of a trust,

[276]ibid 73. Note also that Stuart VC was paraphrasing the comments of Lord Eldon LC in *Paine v Hall* (n 84) 475.
[277](n 66) 97.
[278](n 223).
[279]ibid 521-522.
[280](n 130)
[281]ibid 535.
[282] (n 160).
[283]ibid 408.

communicated to him by A, on the faith of which acceptance the will was made or left unrevoked…'[284]

In *Blackwell*, Viscount Sumner emphasised the similarities between secret trusts and resulting trusts, pointing out that it would be illogical for the court to refuse to give effect to a half-secret trust on the ground that it does not appear in the will but then to impose unquestioningly a resulting trust in favour of the estate '[as if] the will gives the fund to the legatee in trust for the residuary legatee, as if the document, signed and witnessed, had said so in words'.[285] Neither resulting nor secret trusts appear in the will, but both are imposed when appropriate as a result of the 'exercise of general equitable jurisdiction'[286] with which the legislature has never sought to interfere. Resulting trusts, which are routinely and uncontroversially imposed on legacies[287] are *dehors* the will in exactly the same way as secret trusts are. This also goes a long way towards answering those who claim that a half-secret trust, because it is identified on the face of the will, must be an express trust.[288] A half-secret trust is no more an express trust than is a resulting trust arising when property is bequeathed by will to a trustee to hold subject to a trust appearing in the will but whose objects are uncertain.

Also of relevance is the almost total absence of references in the secret trusts cases to the normal requirements for express trusts, such as the three certainties.

[284](n 42) 341. See also *Falkiner* (n 171) 95 (Tomlin J).
[285](n 42) 338.
[286]ibid 339.
[287]For example, in the case of a half-secret trust communicated after the execution of the will (e.g. *Briggs v Penny* (n 149)), or in a case where a party takes as a trustee but the objects or beneficial interests are uncertain (see *Boyce v Boyce* (1849) 16 Sim 476, 60 ER 959).
[288]See especially Sheridan, 'English and Irish Secret Trusts' (n 46); Andrews, 'Creating Secret Trusts' (n 46); Glister and Lee, *Modern Equity* (n 44) 162.

Conversely, the requirements of intention, communication and acceptance have, as has been seen, been emphasised on many occasions. Moreover, there is a direct Court of Appeal authority that the three certainties do not need to be satisfied. In *Russell v Jackson*, Turner LJ stated that rather than being cases where all three certainties had to be proven (as alleged by the defendant),[289]secret trusts fell within 'that class of cases which says that, if there be fraud, it lies on the party who has been guilty of the fraud to sever the disposition which is affected by the fraud from that which is not affected by the fraud.'[290] In light of the fact that it is often claimed that, if secret trusts are *dehors* the will, they are express *inter vivos* trusts, it is also notable that, in *Re Tyler,*[291] secret trusts were expressly distinguished from 'trust[s] created *inter vivos'*.[292] Overall, in the face of so many authorities, it can scarcely be in doubt that secret trusts arise *dehors* the will. It is no less well-established that secret trusts are not express *inter vivos* trusts, but are trusts arising through operation of equity, imposed for the prevention of fraud. This explains why, despite assertions to the contrary,[293] the Law of Property Act 1925, s53(1)(b) does not affect secret trusts.

It will be recalled that in 2.2.3, above, it was argued that the authorities seem to suggest that category one parol agreement trusts have never been regarded as express or resulting trusts, but that, until the mid-twentieth century, they were never referred to judicially as constructive trusts. A similar trend can be observed in respect of secret trusts, albeit that the shift in nomenclature came later. In *Kasperbauer,*

[289]The reason being that, according to counsel for the defendant, it was unclear what proportion of the residue was to form the subject matter of the secret trust.
[290](n 99) 213 (Turner LJ).
[291][1967] 1 WLR 1269, Ch
[292]ibid 1275 (Pennycuick J).
[293]See, for example, McFarlane, 'Constructive Trusts' (n 46); Critchley, 'Instruments of Fraud' (n 44).

Healey and *De Bruyne,* as well as in *Paragon Finance v Thakerar,*[294] secret trusts were described as constructive trusts. It is also notable that, in both of the authorities in which *inter vivos* category two parol agreement trusts were enforced, they were held to be constructive trusts. These findings are consistent with the classification of the trust in *Bannister*, and also add weight to the previous suggestion that, prior to the twentieth century, if a trust was found to have arisen for the prevention of fraud, no further classification or justification were necessary.

2.4 Summary

The authorities overwhelmingly attribute the enforcement of category one and two parol agreement trusts to the prevention of fraud. B has never been permitted to rely on either s53(1)(b) of the Law of Property Act 1925 or s9 of the Wills Act 1925 as an engine of fraud. Furthermore, there is little room for doubt that trusts within both of these categories are enforced in order to prevent the kind of fraud which would arise if B were permitted to renege on the parol agreement upon which A relied when devising his or her property or transferring it *inter vivos*. It is apparent from numerous authorities that, whether or not B had dishonest designs, and whether B might profit from any deviation from the parol agreement, are of no consequence whatsoever. It seems that, historically, category one and two parol agreement trusts were regarded not as express, resulting or constructive trusts, but as trusts arising out of equity's

[294][1999] 1 All ER 400, CA, 409 (Millett LJ).

jurisdiction to prevent fraud. What is opaque at this point, however, is the reason why category one and two parol agreement trusts began to be described as constructive trusts in the twenty-first century.

As far as secret trusts are concerned, as well as confirming that the prevention of fraud is the underlying reason why all secret trusts are recognised, this chapter has shown that much of the confusion surrounding the *dehors* the will theory has stemmed from a fundamental misunderstanding of the meanings of 'testamentary disposition' and 'will', as applied by the judiciary, and thus of s9. If the narrower meaning proposed here is accepted, all of the authorities cited here can be reconciled with one another. The fraud theory and the *dehors* the will theory are not mutually exclusive. Rather, are both necessary to explain why secret trusts are enforced. The trust which arises for the prevention of fraud is *dehors* the will and *dehors* the ambit of s9 of the Wills Act, just as in cases of *inter vivos* category two parol agreement trusts of land, equity imposes a constructive trust which is *dehors* the deed of conveyance, and *dehors* the ambit of s53(1)(b) of the Law of Property Act 1925. It can thus be seen that both *inter vivos* and *post mortem* category two parol agreements are theoretically indistinguishable, being enforced for the same reason and pursuant to the same legal mechanism.

A final point to make is that the findings of this chapter strongly suggest that category one and two parol agreement trusts are also theoretically justifiable and explicable on exactly the same grounds. This raises the distinct possibility that all parol agreement trusts may be enforceable pursuant to a common doctrine. It is anticipated that the next chapter of this thesis, which is concerned with those parol

agreement trusts which arise when A is *not* a party to the parol agreement, will shed light on this issue, as well as on the other unanswered questions which remain at this point in the thesis

Chapter 3: Category Three Parol Agreement Trusts and 'Hybrid' Cases[1]

3.1 Introduction

This chapter is concerned primarily with the line of cases epitomised by *Rochefoucauld v Boustead,*[2] and *Pallant v Morgan*,[3] i.e. those in which A transfers property to B subject to a parol agreement entered into between B and C pursuant to which B will hold some or all of the land for the benefit of C. Unlike the parol agreement trusts considered in the previous chapter, in none of the category three parol agreement trusts does A convey to B in reliance on the parol agreement. Usually, in fact, A is not a party to the parol agreement, and may not even be aware of its existence.

Cases such as *Rochefoucauld*, in which the parol agreement relates to the entire beneficial interest in the property, are often treated separately from those in the *Pallant* line, in which the parol agreement relates only to part of the property. In both instances, A has transferred the land to B (usually, A has sold to B), and in both instances, prior to his acquisition of the land, B agreed with C that C would have an interest in the land. It is therefore arguably rather arbitrary to separate the two lines of cases purely according to the extent of the beneficial interest which C is promised. Accordingly, the cases in both lines are to be treated, for the purposes of this thesis, as category three parol agreement trusts.

[1] This chapter contains material published in G Allan, 'Ceylon Coffee, the Comtesse and the Consignee: A Historical Reappraisal of *Rochefoucauld v Boustead*' (2015) 36 JLH 43; G Allan, 'Once a Fraud, Forever a Fraud: the Time-Honoured Doctrine of Parol Agreement Trusts' (2014) 34 LS 419; G Allan, '*AM v SS*: Fraud and Uncertainty' [2015] 4 Conv 340.
[2] [1897] 1 Ch 196, CA.
[3] [1953] Ch 43, Ch

Category three parol agreement trusts pose certain theoretical difficulties, for in this class of cases, it may not be immediately obvious where any fraud lies. It cannot be said that the victim of the fraud is A, because in such cases s/he is not a party to the agreement, and cannot therefore be said to have been deceived into disposing of his/her property. On the other hand, C, who was a party to the parol agreement, did not have an interest in the property at the time of the parol agreement so cannot easily be considered to have been deprived of it if the parol agreement is not honoured. Modern explanations tend to centre around the idea that the trust will only be enforced if C has demonstrably relied to his/her detriment on the parol agreement,[4] or because B has gained dishonestly as a result of his/her broken promise.[5] Fraud is rarely cited as the underlying reason for equity's intervention in these circumstances, especially in attempts to demonstrate that all cases within this class are united by common principles.[6]

Prior to considering these issues, however, this chapter will seek to establish the extent to which *Rochefoucauld* truly belongs within this category of parol agreement trusts. This chapter will provide a full account and analysis of the facts and factual background of the *Rochefoucauld* through the use of all extant law reports,[7]

[4] In K Gray and SF Gray, *Elements of Land Law* (5th edn, OUP, Oxford, 2008) 882, it is stated that there must be a 'change of position or detrimental reliance… in order that a constructive trust should arise in English law'. See also S Gardner, 'Reliance-based Constructive Trusts', in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart, Oxford, 2009) 68 (Gardner explains the detriment as a 'reliance loss'); N Hopkins, 'The *Pallant v Morgan* Equity' [2002] Conv 35; Y K Liew, '*Rochefoucauld v Boustead* (1897)', in P Mitchell & C Mitchell (eds), *Landmark Cases in Equity* (Hart, Oxford 2012).

[5] See B McFarlane, 'Constructive Trusts Arising on a Receipt of Property Sub Conditione' (2004) LQR 667; Hopkins 'The *Pallant v. Morgan* "Equity"' (n 4).

[6] For example, McFarlane, 'Constructive Trusts' (n 5) 676; Gardner, 'Reliance-based Constructive Trusts' (n 4) 68.

[7] In addition to the ICLR report, the following reports were used: (1896) 65 LJ Ch 794; (1896) 74 LT 783, Ch; [1896] All ER Rep Ext 1911, CA; (1896) 66 LJ Ch 74, CA. Also, '*De La Rochefoucauld v Boustead*' The Times, 24 June 1896 (CA); '*De La Rochefoucauld v Boustead*' The Standard, 28 April 1898 (CA) 3. The following reports concerning the Comtesse de la Rochefoucauld's divorce from her first husband were also used: *Cavendish v Cavendish and Rochefoucauld,* The Times, 18 June 1866 (Ct for Divorce and Matrimonial Causes); *Cavendish v Cavendish and Rochefoucauld* (1868) 19 TLR 497. Finally this report of the liquidation of John Boustead's firm was utilised: *Re Price, Boustead, and Co.*, The Times, 30 July 1879, (Ct of Bankruptcy).

contemporary newspaper reports and archive materials which have, other than in this thesis and the article based on this research, never before been cited in relation to any discussion of *Rochefoucauld*.[8] This necessity arises because, despite *Rochefoucauld*'s status as a long-standing leading authority,[9] there is no consensus regarding from whom the conveyance to B was executed, whether A was party to the parol agreement, exactly why B's conduct amounted to a fraud in the eye of equity, and whether the trust that was imposed was express or constructive.[10] It is not even accepted by all modern authorities that *Rochefoucauld* ought to be regarded, from a modern perspective, as a case involving fraud.[11] It is thus submitted that the conclusions to the research question may only be reached by either supporting or rejecting the principles arising from such a central authority as *Rochefoucauld*, and neither is possible without full awareness of the facts of this extraordinary case

There are several further aims of this chapter. As with the previous two chapters, the extent to which the prevention of fraud and the instrument of fraud principle are relevant to the enforcement of category three parol agreement trusts will be analysed, as will the degree to which the authorities provide clarification on the nature of fraud in equity. Furthermore, there is a small handful of cases which are evidently parol agreement trusts, but which cannot be placed squarely within any of

[8] The Baring Archive, London holds many documents which have proven to be of great value. I would like to extend my gratitude to Ms Lara Webb of the Baring Archive for her unfailingly efficient, polite and helpful assistance, and for allowing me to utilise her extensive knowledge of the Archive for the benefit of my research. Furthermore, Stadsarcheif Amsterdam holds some documents that are of critical importance to establishing the facts of *Rochefoucauld*. I would also like to extend my gratitude to Mr Harmen Snel and Mr Goran Pravilovic, both of the Stadsarcheif Amsterdam, for their similarly invaluable assistance.

[9] For some recent examples of *Rochefoucauld* being cited, see *Crossco No. 4 v Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All ER 754 [93] (Etherton LJ); *De Bruyne v De Bruyne* [2010] EWCA Civ 1519, [2010] 2 FLR 1240 [51] (Patten LJ); *Samad v Thompson* [2008] EWHC 2809 (Ch), [2008] NPC 125 [128] (Sales LJ); *Singh v Anand* [2007] EWHC 3346 (Ch) [44] (Norris J); *Banner Homes Group Plc. v Luff Developments Ltd.* [2000] Ch. 372, CA, 383 (Chadwick LJ).

[10] See below, 3.5.1.

[11] See, for example, McFarlane, 'Constructive Trusts' (n 5) 676; *Samad* (n 9).

three categories of parol agreement. The extent to which these 'hybrid' cases illuminate the research questions of this thesis will also be examined in this chapter.

Another significant aim of this chapter is to consider the proper classification of category three and hybrid parol agreement trusts. This discussion will assume particular pertinence in this chapter because, in *Rochefoucauld*, Lindley LJ described the trust as 'clearly an express trust within the meaning of that expression as expressed in *Soar v Ashwell.*'[12] This statement is noteworthy because *Rochefoucauld* is the only case which has been discovered for the purposes of this thesis in which a parol agreement trust was (seemingly) described by the court as an express trust. Particular attention will thus be paid to the Court of Appeal's classification of the trust in *Rochefoucauld* and to the significance of the court's reasoning to the modern law and the findings of this thesis. This analysis should also facilitate an assessment of whether the treatment in this thesis of cases in the *Rochefoucauld* and *Pallant* lines as theoretically indistinguishable is justified.

3.2 Analysis of the Facts of *Rochefoucauld v Boustead*

3.2.1 Why are the facts of Rochefoucauld unclear?

Rochefoucauld is a superficially straightforward case. The defendant, Boustead, to whom certain estates had been conveyed by mortgagees in an absolute form but subject to a parol agreement that he would take as trustee, was held to have taken on trust for the Comtesse de la Rochefoucauld, who was the plaintiff. His defence that s7 of the Statute of Frauds 1677, which required that declarations of trusts of land be 'manifested and proved by some Writing', had not been complied with was

[12] *Rochefoucauld* (n 2) 208 (Lindley LJ).

rejected on the ground that Boustead could not be permitted to use the statute as an instrument of fraud.[13] Boustead's other two main defences,[14] namely that the considerable delay on the part of the Comtesse in commencing the action offended both the statutory limitation period of the day[15] and the doctrine of laches[16] were also unsuccessful. The former was rejected on the ground that the trust fell within the exception to the limitation period that applied to express trusts,[17] and the latter because Boustead had, at one point, encouraged the Comtesse not to sue and because none of the Comtesse's actions suggested abandonment of her claim.[18]

There are several aspects of *Rochefoucauld*, however, that are not so straightforward. Firstly, the precise facts of the case are difficult to ascertain. The law reports do not make clear exactly why, by whom, or by which legal mechanism the estates were sold, nor is it obvious to what extent the Comtesse was a victim of circumstance or an active protagonist in securing the sale. A complicating factor is that Ceylon was, and still is, subject to Roman-Dutch law. [19] The Roman-Dutch rules relating to mortgages and sales by mortgagees in the nineteenth century were very different from those in common law jurisdictions.[20] In view of these difficulties, it is perhaps not surprising that several different versions of the facts have been

[13] *Rochefoucauld* (n 2) 206 (Lindley LJ).
[14] Boustead pleaded two other defences. His first defence, which was rejected outright, was a flat denial that he had agreed to take as a trustee. He also argued that any beneficial interest that the Comtesse may have possessed did not survive his bankruptcy. This defence was rejected on the ground that s49 of the Bankruptcy Act 1869 did not prohibit claims by beneficiaries against the bankrupt's estate (ibid 209 (Lindley LJ)). Additionally, he argued that the Statute did not apply in Ceylon, to which the Court of Appeal's response was essentially that as the action was being brought in an English court, then the English law applied (ibid 206 (Lindley LJ)).
[15] See below, 3.5.1.1 for a brief explanation of the manner in which the limitation period operated in the nineteenth century.
[16] The doctrine based on the maxim that delay defeats equity.
[17] *Rochefoucauld* (n 2) 208-209 (Lindley LJ).
[18] ibid 211 (Lindley LJ.)
[19] See R W Lee, 'The Fate of the Roman-Dutch Law in the British Colonies' (1906) 7 Journal of the Society of Comparative Legislation 357 359. It was assumed in Liew, '*Rochefocuauld v Boustead*' (n 4), in P Mitchell & C Mitchell (eds), *Landmark Cases in Equity* (Hart, Oxford 2012) that the mortgage was an English-style mortgage.
[20] See below, 3.2.2.2. Liew, '*Rochefocuauld v Boustead*' (n 4) mistakenly presumed that the mortgage was akin to an English mortgage.

propagated.[21] The conveyance has been variously described as amounting essentially to an assignment from the Comtesse to Boustead subject to the parol trust in her favour,[22] as an assignment executed by the mortgagee in reliance on the parol agreement between the Comtesse and Boustead, [23] as an assignment to Boustead subject to, but executed by the mortgagee independently of, the parol agreement, [24] as an assignment by the mortgagee pursuant to a power of sale,[25] and as an assignment to Boustead subject to a parol agency agreement made between Boustead and the Comtesse.[26]

Much of this uncertainty can be attributed to the fact that that the ICLR report of *Rochefoucauld*[27] does not seem to explain all relevant circumstances with a sufficient degree of precision for a full account of the facts of the case to be gleaned. Furthermore, many issues which would likely have been widely-known at the time of the judgment, such as, for example, the manner in which land in the colonies was customarily mortgaged and subsequently dealt with, have since been obscured by the passage of time.

Whilst the research for this section of the thesis was being conducted, it became increasingly apparent that the facts of *Rochefoucauld* are far more complex than has previously been appreciated. Therefore, a very detailed narrative and analysis is

[21] The conveyance has been described as amounting essentially to an assignment from the Comtesse to Boustead subject to the parol trust in her favour (see Philip H. Pettit, *Equity & The Law of Trusts* (10th edn, OUP, Oxford, 2006) 96; J D Feltham, 'Informal Trusts and Third Parties' [1987] Conv 246, 247), and as an assignment executed by the mortgagee in reliance on the parol agreement between the Comtesse and Boustead (see Gardner, 'Reliance-based Constructive Trusts' (n 4) 68); McFarlane, 'Constructive Trusts' (n 5) 274-675. It has also been described as an assignment to Boustead subject to, but executed by the mortgagee independently of, the parol agreement (see T G Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*', (1984) 43 CLR 306, 328-329).
[22] Pettit, *Equity & The Law of Trusts* (n 21); Feltham, 'Informal Trusts' (n 21).
[23] Gardner, 'Reliance-based Constructive Trusts' (n 4) 674-675.
[24] Youdan, 'Formalities' (n 21) 328-329.
[25] Liew, '*Rochefocuauld v Boustead* (n 4).
[26] *Adaicappa Chetty v Asaicappa Chetty* (1921) 2 22 NLR 417 (PC).
[27] *Rochefoucauld* (n 2).

presented here. It is submitted that such an approach is justifiable on the grounds that *Rochefoucauld* represents perhaps the most important of all of the authorities covered in this thesis, and has a unique position as the only authority covered here which is so opaque in terms of its facts and judgment. *Rochefoucauld* is, as will be seen, an exceptional case which warrants exceptional treatment.

3.2.2 The factual background to Rochefoucauld

3.2.2.1 The Comtesse de la Rochefoucauld's family background and divorce

The estates which were eventually sold to Boustead were Ceylonese coffee plantations which were known as the Delmar Estates (hereafter, the 'Estates'). They were originally owned by the plaintiff's uncle (and adoptive father), the Baron de Delmar. The Baron had mortgaged the Estates to Barings in 1857. When, in 1861, the plaintiff inherited the Estates, they were still encumbered by the mortgage. Furthermore, the plaintiff (not yet a Comtesse) had married a George Cavendish in 1848.[28] It should here be noted that, in the nineteenth century, Ceylon operated a system of registration of title deeds.[29] The plaintiff was registered owner of the Estates, for she had inherited them in her own right, independently of her husband.[30] In 1865, Cavendish filed for divorce, pursuant to the Matrimonial Causes Act 1857, s45, on the ground of the plaintiff's 'adultery with Count Gaston de la

[28] *Times* (London, 18 October 1848), 7.
[29] See generally E J Taylor, 'Registration of Title Deeds Under Roman-Dutch Law' (1886) 2 LQR 347.
[30] See the will of the Baroness de Delmar, Baring Archive, HC6.3.22.3, 1859. Under Roman-Dutch law, however, it was possible for a woman to retain ownership of, and control over, her property after marriage. See R W Lee, *An Introduction to Roman-Dutch Law* (1st edn, OUP, Oxford, 1914) 91. It is apparent from a deed which transferred the mortgage from Barings to another mortgagee (Baring Archive, HC6.3.7, 1864) that the Comtesse had the power to deal with the estates unfettered by her husband.

Rochefoucauld',[31] whom she had met in 1857.[32] A decree absolute was granted in December 1867.[33] The plaintiff married the Count on 20 August 1870,[34] as a result of which she became Comtesse de la Rochefoucauld.

Cavendish then petitioned the court to apply some or all of the property of the marriage settlement for the benefit of himself and their children. The court went further than this; on July 31 1868, the Judge Ordinary ordered 'certain property in Ceylon [the Estates] and in [a] Dutch company brought into the settlement by the respondent to be assigned by her to two trustees'.[35] It seems that the Comtesse did not take kindly to the 1868 decree. Fortunately for her, she had numerous influential friends in France, the most notable of whom was the Emperor of France, Napoleon III.[36]According to one report, '[o]n the Continent strong views were taken of the injustice of that judgment and Mrs. Cavendish [i.e., the Comtesse] was not only created Baroness Delmar in her own right, but steps were taken to put the estates outside the reach of the Divorce Court.'[37]

Prior to analysing these 'steps', the nature of both the mortgage and the mortgagee to which it was assigned will be considered.

[31] *Cavendish v Cavendish and Rochefoucauld*, The Times, 18 June 1866, 11.
[32] ibid.
[33] According to *Cavendish v Cavendish and Rochefoucauld* (1868) 19 TLR 497.
[34] <http://www.thepeerage.com/p56333.htm>accessed 25 July 2014.
[35] *Cavendish* (n 33) 497. The 'Dutch Company' mentioned may have been the Société Genéralé de Commerce et d'Industrie of Amsterdam (discussed below at 3.2.2.3). Although the Comtesse is not listed as a shareholder in the records of the Société (which are held by the Stadsarcheif, Amsterdam), she may have owned shares through a nominee, or possessed some other type of interest. Probably, the extent of any interest that she may have possessed in the Société is now impossible to ascertain.
[36] See H Rumbold, *Recollections of a Diplomatist*, Vol 1 (Edward Arnold, London 1903) 90-91. Note that the Comtesse's original surname was 'Rumbold'. The author of *Recollections* was her brother.
[37] *De La Rochefoucauld v Boustead, Standard* (London, 28 April 1898) 3, CA.

3.2.2.2 The mortgage: its nature and assignment

The Estates were mortgaged on 26 June 1857 in Ceylon for a sum of £50,000. The mortgage agreement, which describes the security as a 'mortgage and hypothecation', entitled Barings to manage the Estates, and assigned all produce of the Estates arising until 30 June 1863 to Barings, to be used in repayment of the interest and capital. It was agreed that this and any further outstanding sums would be repaid by 30 June 1863. [38]

The contemporary nature of Roman-Dutch mortgages was explained by Thomson:

> In the law of Ceylon, the English mortgage, which conveys the legal estate to the mortgagee, does not exist, but is replaced by a simple deed of hypothecation, which has the effect of tacking the debt to the property, so that a creditor obtains a right to follow it through whatever hands it may happen to pass, and may obtain a decree for its attachment and sale in satisfaction and discharge of the debt; so that by a very simple deed the Ceylon mortgage obtains all the advantages of the English mortgage, but with one exception, that the Ceylon mortgage, in general, gives to the mortgagee no power of sale on failure of interest or redemption ; but he must foreclose in court.[39]

Thomson was almost certainly not using the term 'foreclose' in the technical sense; i.e. the cancellation of the mortgagor's equity of redemption. Rather, this was a

[38] A signed and sealed copy of the original 1857 mortgage deed is currently in the possession of the Baring Archive (Baring Archive, HC6.3.7, 1857).
[39] H W Byerley Thomson, *Institutes of the Laws of Ceylon*, Vol 1(1st edn, Trubner & Co, London, 1866) x. Note that Liew, '*Rochefocuauld v Boustead* (n 4) assumes that the mortgage was governed by principles of English law.

reference to the mortgagee's power to obtain a court-sanctioned sale of the mortgaged land. Elsewhere, Thomson refers to the only purpose of a 'foreclosure suit' being to obtain a 'sale in execution' of mortgaged land,[40] and also explains in detail the procedure for obtaining a sale in execution.[41] In England, the most common mortgagee's remedy at the time was 'a bill for a foreclosure'.[42] The Court of Chancery Procedure Act 1852 gave the Court of Chancery a general power to order a sale in response to a foreclosure suit.[43] Perhaps, therefore, in the second half of the nineteenth century, it was customary to refer to any suit which could result in a judicial sale as a foreclosure suit. In 1915, Lee commented that, under Roman-Dutch law, '[f[oreclosure is unknown, and sale cannot be effected except with the consent of the debtor. The proper and only mode of realizing a mortgage is by obtaining a judgment of the court upon the mortgage debt and taking out a writ of execution against the property.'[44] Lee's comments appear irreconcilable with those of Thomson unless, as seems likely, Thomson was using the term 'foreclose' in the non-technical sense described above, whilst Lee was referring to technical foreclosures. The term 'foreclose' is also used in reference to the sale of the Estates in *Rochefoucauld*[45]and in the correspondence of the interested parties,[46] presumably also in this informal sense, for it was known to the Court of Appeal and the parties concerned that the Estates had been sold, and that no technical foreclosure had taken place.

Differences in nomenclature aside, both Thomson and Lee concurred that the normal way of enforcing a mortgage in Roman-Dutch jurisdictions was to obtain a

[40] ibid, 256.
[41] ibid, 349-355.
[42] J W Smith, *A Manual of Equity Jurisprudence* (5th edn, Stevens & Norton, London 1856 252-253.
[43] ibid., 253-254.
[44] Lee, *An Introduction* (n 30) 180-181.
[45] *Rochefoucauld* (n 2) 97.
[46] The attorneys of the Société in Ceylon, Robertsons, wrote to the Société on 22 July 1871 to explain that 'the foreclosure of your mortgage is being proceeded with' (Stadsarcheif, Amsterdam, inventory number 20 of archive 650, 1871).

judicial sale. The wording of the 1857 mortgage agreement, which makes no mention of any power of sale, nor of any conferment of legal title upon Barings, and the location in which the agreement was executed, both show that the mortgage was a Ceylonese mortgage subject to Roman-Dutch law. In 1863, the debt and mortgage were assigned by Barings to the Société Genéralé de Commerce et d'Industrie of Amsterdam (hereafter referred to as 'the Société') in consideration of £12,000.[47] Furthermore, the Comtesse granted to J.M. Robertson & Co. a power of attorney which empowered the Robertsons to take the produce of the Estates, and to sell the Estates, in furtherance of repayment of the debt.[48]

3.2.2.3 The Société and its liquidation

Little information about the Société can be gleaned from the law reports of *Rochefoucauld*, other than that the Société was in liquidation by 1871, and that the liquidators were apparently keen to call in the security. The Dutch name of the Société was the Algemeene Maatschappij voor Handel en Nijverheid NV. Extensive records concerning the Société and its affairs are held in the Stadsarcheif Amsterdam.[49] It was a bank founded in 1863[50] with the aim of promoting industrial development.[51] Its majority shareholder from the outset was a French bank called Crédit Mobilier.[52] The Société was not a success; it was embroiled in financial

[47] See Baring Archive, HC6.3.7, 1864.
[48] Robertsons had initially acted as agents in Ceylon of Barings (see Baring Archive, HC6.3.7, 1864), and continued to act in that capacity for the Société (see Stadsarcheif Amsterdam, 650/20, 1871).
[49] For details relating to the Stadsarcheif Amsterdam, see n 8, above.
[50] The 1863 instrument transferring the debt and mortgage to the Société explains that the Société was known in the Netherlands as the Algemeene Maatschappij vor Nijverheid en Handel [sic.]. The prospectus of the company (Stadsarcheif Amsterdam 650/4, 1863) makes it clear that the Société Genéralé de Commerce et d'Industrie of Amsterdam was also known as the Algemeene Maatschappij voor Handel en Nijverheid.
[51] M Wintle *An Economic and Social History of the Netherlands 1800-1920 Demographic, Economic and Social Transition* (Cambridge University Press, Cambridge 2000) 105.
[52] Stadsarcheif Amsterdam, 650/4, 1863.

scandals almost immediately,[53] and, by 1864, it was already hopelessly insolvent. [54] According to one source, part of the reason for the difficulties encountered by the Société was a 'reckless policy… [of] over-investing in foreign securities'.[55] It is distinctly possible that the Société's purchase of the mortgage of the Estates was a result of these over-enthusiastic spending habits, especially as, from 1865, it was decided that the Société was to focus its operations on its affairs in the Dutch East Indies.[56]. In any event, in 1868, the Société's president, Antide Martin, and its 'Secrétaire de la Direction', Frans Müller, were appointed as its liquidators. [57] Notably, Müller was a director of the Rotterdamsche Bank, which was active in the Dutch East Indies, from 1869 to 1882,[58] also serving as its president

The duration of the liquidation is difficult to ascertain for certain. The Société certainly failed eventually, and was wound up, although sources are not consistent as to precisely when this occurred.[59] In fact, it seems that the Société came out of liquidation some time between 18 August 1872 and 15 October 1872,[60] and it certainly produced ledger entries and current account records until 1878,[61] although the scarcity of records from that period in the archive would suggest that its activities

[53] Report to the Société's annual general meeting of shareholders, 29 March, 1864, Stadsarcheiif Amsterdam, 650/4, 1864.
[54] ibid.
[55] M Pohl and S Freitag, *Handbook on the History of European Banks* (European Association for Banking History, Aldershot 1994) 722.
[56] Report to the Société's annual general meeting of shareholders, 29 March, 1864, Stadsarcheiif Amsterdam, 650/4, 1864.
[57] Report of the resolutions of the Société's annual general meeting of shareholders, 25 March 1868 (Stadsarcheiif Amsterdam, 650/4, 1868).
[58] Nederlands Nationaal Archeif 2.18.33, PDF available at <http://www.gahetna.nl/en/collectie/archief/ead/index/eadid/2.18.33/anchor/descgrp-appendices-odd/zoekterm/Leichlingen/aantal/20/open/descgrp-appendices-odd#descgrp-appendices-odd> accessed 10 June 2014.
[59] According to R Narula and R van Hoesel (eds) *Multinational Enterprises from the Netherlands* (Routledge, London, 1999) 48, n 32, the Société was liquidated in 1864/67. According to Pohl and Freitag, *European Banks* (n 55) 722, the Société was wound up in 1868.
[60] Photocopies of 35 letters concerning the Delmar Estates sent from J.M Robertson & Co to the directors of the Société between 13th May 1871 and 21 Feb. 1873 have been obtained from the Stadsarcheif Amsterdam, 650/20. The last letter addressed to the Société 'in liquidation' was sent on 18 Aug. 1872. All letters sent from 15 Oct 1872 omit 'in liquidation' from the Société's name.
[61] Stadsarcheif Amsterdam, 650/26 and 650/27.

were much reduced after the commencement of the liquidation. Narula and van Hosel report that after the Société failed, one of its subsidiaries, the Nederlandsch-Indische Spoorweg Maatschaapij 'was carried on by private individuals'.[62] Similarly, Pohl and Freitag report that 'a few subsidiaries survived [the Société's demise], such as the *Netherlandsch-Indische Handelsbank*, which, amongst other things, as a colonial agricultural bank, concentrated on the banking opportunities in the Netherlands Indies'.[63] It therefore seems likely that the Société's operations in Ceylon continued for several years after it entered liquidation, and that its activities in that part of the world were ultimately carried on by one or more of its subsidiaries or, indeed, by the Rotterdamsche Bank, with which the Société became very closely linked through Müller.

3.2.3 *The Sale of the Estates*

The law reports give relatively little information regarding precisely how and why the sale of the Estates came about. It is variously stated that they were sold 'under a power of sale',[64] by the 'liquidators' of the company,[65] by 'the mortgagees',[66] and also that they were sold, but without reference to the identity of the seller.[67] It is also stated that the Comtesse entered the parol agreement whereby Boustead would purchase the Estates as trustee for her because the Dutch company wished to call in the mortgage, and '[she was] not… in a position to find the money'.[68] One of the reports also hints at some conspiracy, stating that 'it was a great object of the plaintiff and her friends to prevent Mr Cavendish from deriving any benefit from these

[62] Narula and van Hoesel *Multinational Enterprises* (n 59) 48, n32.
[63] Pohl and Freitag, *European Banks* (n 55) 722.
[64] *Rochefoucauld v Boustead* (1896) 74 LT 783, Ch, 783.
[65] ibid.
[66] *Rochefoucauld* (n 2) (196).
[67] *Rochefoucauld v Boustead* [1896] All ER Rep Ext 1911, CA, 914 (Lindley LJ).
[68] *Rochefoucauld* (n 2) 196.

estates'.[69] From various sources, it has been possible to piece together a detailed account of the circumstances preceding and surrounding the sale of the Estates and the purchase thereof by Boustead.

3.2.3.1 The facts leading to the sale

On 9 November 1866, a solicitor named Hodgson, acting for Cavendish, wrote from London to Robertsons in Ceylon explaining that his client had presented a petition to the Divorce Court, warning that the court possessed a statutory power, 'upon Divorce being pronounced for adultery of the wife, to settle her fortune as it may think reasonable for the benefit of the innocent party, and the children'.[70] Hodgson commented that although the Comtesse had refused to acknowledge service of an official copy of the petition, such a copy had been served upon the Société. He provided reassurance that the Société's rights as mortgagees would not be compromised by any order of the Divorce Court, but threatened that 'no payment made by the Society to Mrs Cavendish in opposition to the order of the Court here would be recognised in any manner'.[71] Hodgson also reminded Robertsons that 'by the ordinance of your Government dated 23 December 1844 there will be no difficulty in carrying out the settlement whatever that may be.'[72] The tenor of this letter suggests that Cavendish expected that the Divorce Court's decree would be carried into effect irrespective of the several jurisdictions involved.

Despite Hodgson's letter, the Estates were never transferred to the English trustees in accordance with the 1868 decree. There is a wealth of correspondence from as

[69] *Rochefoucauld* (n 67) 1914 (Lindley LJ).
[70] Stadsarcheif Amsterdam, 650/17, 1866. The statutory provision to which Hodgson was referring was the Matrimonial Causes Act 1857, s45.
[71] ibid.
[72] ibid.

early as August 1870, which indicates that, soon after the 1868 decree, the Société became extremely keen to realise its security[73] by causing the Estates to be sold.[74] Furthermore, some time before 23 February 1871, the Comtesse revoked the power of attorney that had been granted to Robertsons in December 1863.[75] Accordingly, Robertsons informed Müller that it would now act in the exclusive interests of the Société.[76]

At around this time, the Comtesse began negotiations with a view to obtaining control over the Estates. These negotiations culminated in a written agreement of 1 July 1871 between the Société on the one hand and two gentlemen by the names of Duff and Boustead on the other hand. [77] Duff was a friend of the Comtesse.[78] Either Duff or the Comtesse's agent in Ceylon, a Mr Sabonadière,[79] brought the defendant, Boustead, with whom Sabonadière had had past business dealings, into the scheme on account of his experience as a manager and consignee of coffee estates.[80] The agreement provided that the liquidators would sell the estates by auction.[81] If there was no tender that bettered that of Duff and Boustead, the estates were to be sold to them for an amount sufficient to discharge the mortgage. There was no mention of any beneficial interest being vested in the Comtesse, even though she had reached an understanding with Boustead and Duff, probably through their agents in Ceylon,

[73] The earliest references are from 7 and 28 Aug. 1870 (Stadsarcheif Amsterdam, 650/20, 1870).
[74] The first specific reference to a sale in the available documentation appears in Robertson's account, in a letter sent to the Société dated 13 May 1871 (Stadsarcheif Amsterdam, 650/20, 1871), of a telegram sent by Müller to Robertsons whereby Müller had enquired urgently as to whether the sale of the Estates had been fixed.
[75] This information is contained in a telegram sent by Müller to the Société on 23 Feb 1871 (Stadsarcheif Amsterdam, 650/20, 1871).
[76] ibid.
[77] *Rochefoucauld* (n 67) 915 (Lindley LJ).
[78] ibid 1914 (Lindley LJ). Attempts to obtain further information about Duff have been fruitless.
[79] See *Rochefoucauld* (n 2) 209 (Lindley LJ).
[80] *Rochefoucauld* (n 67) 1914 (Lindley LJ). Boustead's firm, Price, Boustead and Co. managed coffee plantations in Ceylon from London through the use of agents (see *In Re Price* (n 7) 4).
[81] *Rochefoucauld* (n 2) 198.

that they were to take as trustees for her, subject to a charge for repayment of their advances and expenses.[82]

Prior to the agreement of July 1871, Duff and Boustead had planned to take an assignment of the mortgage from the Société. It was reported that Duff had objected to some of the details pertaining to the mortgage transfer, which is why it was agreed that he and Boustead would instead purchase the Estates from the Société.[83] In fact, the Société had commenced legal action in Ceylon against the Comtesse, [84] the Comte[85] and Cavendish, seeking a judicial sale of the Estates.[86] Cavendish was a defendant seemingly on account of his claim to an interest in the Estates as annuitant under the Baroness's will, rather than upon the 1868 decree.[87] The first reference to the suit in the correspondence that has been obtained for the purposes of this part of the thesis appears in the letter from Robertsons of 13 May 1871.[88]

The Société's action to secure a judicial sale suggests that the agreement of July 1871 was of little legal significance. This is because, once a sale of immovable property had been ordered by the District Court, the 'fiscal'[89] responsible for carrying into effect the court's judgment was required by law to advertise details of the impending sale 'in the Government Gazette, and in any other Ceylon newspaper'.[90]

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[82] *Rochefoucauld* (n 67) 1915 (Lindley LJ).
[83] ibid 1914 (Lindley LJ).
[84] Several of the letters from Robertsons to the Société refer to the suit being against the Comtesse. These include letters dated 18 Aug 1871, 27 Oct 1871 (Stadsarcheif Amsterdam, 650/20, 1871) and 7 Feb 1872 (Stadsarcheif Amsterdam, 650/20, 1872).
[85] The Comte was made a defendant merely because he was the Comtesse's husband at the time. This is made clear in a letter from Robertsons to the Société, dated 30 Oct 1872, (Stadsarcheif Amsterdam, 650/20, 1872).
[86] This shows that the Comtesse did not voluntarily surrender her equity of redemption in favour of Boustead, as was suggested by Liew, '*Rochefocuauld v Boustead* (n 4).
[87] Letter from Robertsons to the Société, 30 Oct 1872, Stadsarcheif Amsterdam, 650/20, 1872.
[88] Stadsarcheif Amsterdam, 650/20, 1871.
[89] The fiscals were (and are) officers of the courts in Ceylon (Sri Lanka) with responsibility, *inter alia*, for conducting sales in execution of immoveable property (Civil Procedure Code, 236-250).
[90] Thomson, *Laws of Ceylon* (n 39) 350.

Furthermore, 'a sale in execution [was] an assignment by operation of law',[91] conducted by the fiscal, who was responsible for conveying the land to the eventual purchaser.[92] Therefore, any sale arising out of the Société's suit in Ceylon would be conducted not by the Société on its terms, but by the fiscal who would sell to the highest bidder after public advertisement of the sale.

By 12 February 1872, Robertsons, on behalf of the Société, had been granted sequestration of the Estates pending the final hearing.[93] It should be noted that, although Robertsons regarded it as a formality,[94] sequestration was not part of the usual procedure in a suit for a sale in execution. According to Thomson, sequestration would only be ordered if the court was persuaded that 'the defendant [was] fraudulently alienating his property to avoid payment of the debt'.[95] The sequestration, therefore, appears to be a sign that relations between the Comtesse and the Société had deteriorated. This is corroborated by suggestions by Robertsons that the Comtesse had caused delays in the litigation by refusing to admit accounts of sales of produce that had been produced on the Estates.[96]

Interestingly, letters sent by Robertsons to the Société in April 1872 state that Cavendish was to be unrepresented in the Ceylon suit, and that, as against him, the case would be heard '*ex parte*'.[97] It seems odd that Cavendish all but abandoned his pursuit of the Estates; earlier correspondence suggests that he was intent upon securing them for himself, and that he regarded them as 'my own

[91] ibid., 354.
[92] ibid., 353. This shows that the Société never obtained legal title to the Estates (c.f. Liew, '*Rochefocuauld v Boustead* (n 4).
[93] Letter from Robertsons to the Société, 12 Feb 1872, Stadsarcheif Amsterdam, 650/20, 1872.
[94] ibid.
[95] Thomson, *Laws of Ceylon* (n 39) 378.
[96] Letter from Robertsons to the Société, 12 Feb 1872, Stadsarcheif Amsterdam, 650/20, 1872.
[97] ibid.

property [underlining in original].'[98] Despite his posturing, it seems that Cavendish lacked the funds to redeem the mortgage himself. On 15 January 1872, he wrote to Barings, requesting that they take an assignment of the mortgage from the Société in order to allay his fear that 'the Estates will be irrecoverably lost to myself and my family'.[99] The threat, he wrote, derived from the fact that the Société was 'now foreclosing their mortgage' as it was 'anxious to wind up their affairs'.[100] He also assured Barings that, should they take the mortgage, they would 'only have to deal with the Trustees appointed by the Court of Chancery, by which you will perceive that you will have no dealings whatsoever with my former wife'.[101] All evidence suggests Barings did not accede to his request, and his assumptions about the minimal potential for the future involvement of his 'former wife' seem to have been wishful thinking.

3.2.3.2 The Ceylon trial and the sale of the Estates

The Société's Ceylon suit was heard in the District Court on 4 October 1872. Robertsons provided the Société with a detailed account of the trial.[102] On the day of the hearing, The Comtesse and Comte 'filed an admission of the debt'. The judge gave judgment against them and ordered that the Estates be sold. Owing to some technical details, judgment against Cavendish was reserved. Three months' notice of the impending sale was given, longer than would usually be afforded, so that

[98] Letter from Cavendish to the Société, 12 Feb 1872. See also letters from Cavendish dated 18 Oct and 11 Nov 1871 (Stadsarcheif Amsterdam, 650/20, 1872).
[99] Baring Archive, HC6.3.22.13, 1872. In a letter to the Société dated 11 Nov 1871, Cavendish had indicated that he was planning to 'make enquiries from London Firms if they will pay [the debt owed to the Société] off' (Stadsarcheif Amsterdam, 650/20, 1871).
[100] ibid.
[101] ibid. Presumably, Cavendish was referring to the trustees of his marriage settlement.
[102] This account appears in a letter from Robertsons to the Société, 30 Oct 1872, Stadsarcheif Amsterdam, 650/20, 1873.

Cavendish and another claimant[103] could claim any interests that they possessed. The District Court's decision in respect of the alleged annuities is unknown. As Robertsons did not report any details of any such judgment to the Société, it seems likely that either these claims were abandoned or that there was some sort of settlement reached.

The Estates were sold on 18 and 19 February 1873. Again, a detailed account of the auctions was provided to the Société by Robertsons. [104] The actions were advertised and public,[105] and were conducted by 'the fiscals… under the authority of the court.'[106] The sales were thus conducted in line with Thomson's account of the process of sales in execution.[107] On the date of the auctions, Robertsons took the debt to stand at £56,200[108]. The Société was interested in purchasing the Estates at the auction; [109] Robertsons was authorised by the Société to bid up to £56,200. Although the auctions were well-attended,[110] Robertsons reported a paucity of bidders,[111] attributing this to uncertainty surrounding the nature of Cavendish's claim and rumours, which Robertsons regarded as unfounded,[112] that the children of the Comtesse and Cavendish were planning to claim as beneficiaries of 'an alleged

[103] This other claim, by Mrs Arabin, a sister of Baroness Delmar (see Rumbold, *Recollections* (n 36) 139), of an annuity under the Baroness's will, seems to have come to nothing.
[104] This account appears in a letter from Robertsons to the Société, 20 Feb 1873, Stadsarcheif Amsterdam, 650/20, 1873.
[105] ibid.
[106] Letter from Robertsons to the Société, 13 Nov 1872, Stadsarcheif Amsterdam, 650/20, 1872.
[107] See above, 3.2.2.2.
[108] £53,700 plus £2,500 that Robertsons thought may have been claimable by Mrs Arabin owing to her annuity. This is explained in a letter from Robertsons to the Société, 20 Feb 1873, Stadsarcheif Amsterdam, 650/20, 1873.
[109] Note that, according to Thomson, *Laws of Ceylon* (n 39) 354, '[i]f the party who issued execution purchases any of the property, the amount is allowed in reduction of his claim ; and if it exceed his claim, he only pays the residue…' Therefore, it would seem that the Société's desire to purchase the Estates was not unusual.
[110] Letter from Robertsons to the Société, 20 Feb 1873, Stadsarcheif Amsterdam, 650/20, 1873.
[111] ibid. Each of the individual estates which together comprised the Estates were auctioned in individual lots.
[112] ibid. C.f. Liew '*Rochefocuauld v Boustead*' (n 4), who suggests that the Estates would likely have sold in an open market for a great deal more than the sum which Boustead paid for them.

settlement'.[113] Although Robertsons had valued the Estates at £70,000,[114] they were all sold for £57,942 to Sabonadière, who purchased as agent of Boustead. There was considerable competition for just one of the Estates, the Delmar Estate,[115] which was sold to Boustead for £13,700, even though Robertsons had valued it at £8,200.[116]

At some point prior to the purchase, Duff had pulled out due to ill health and Boustead, wishing 'to become the representative of the plaintiff Comtesse in England and the consignee of the produce of her estates',[117] had agreed that he would proceed alone. The Court of Appeal, being satisfied that Boustead had taken the Estates on the understanding that he was trustee for the Comtesse, did not deem it necessary to decide whether there was any written evidence signed by Boustead sufficient to satisfy s7, but Lindley LJ seems to have considered it likely that there was.[118] He was probably correct. There was no obvious advantage to avoiding writing altogether; so long as there was no mention of the trust in the deeds that were registered,[119] Cavendish could not have discovered the Comtesse's beneficial interest.

A final point to note is that Sabonadière informed Robertsons that Boustead had purchased the Estates for the Comtesse.[120] This information may not have been considered by Robertsons or the Société as overly significant, for a telegram was

[113] ibid.
[114] Letter from Robertsons to the Société, 24 Dec 1872, Stadsarcheif Amsterdam, 650/20, 1872.
[115] Note that this was one of the estates collectively referred to as the 'Delmar Estates'. Others included Delta, Alwick, Kudnoya, Maguhapittia and Pahalateme (Letter from Robertsons to the Société, 20 Feb 1873, Stadsarcheif Amsterdam, 650/20, 1873.).
[116] Letter from Robertsons to the Société, 20 Feb 1873, Stadsarcheif Amsterdam, 650/20, 1873.
[117] *Rochefoucauld v Boustead* (1896) 66 LJ Ch 74, 77.
[118] *Rochefoucauld* (n 2) 206.
[119] Notably, the standard wording for deeds of conveyance in Ceylon contained no provision for declarations of trust- see Taylor, 'Registration of Title Deeds' (n 29) 352.
[120] Letter from Robertsons to the Société, 19 Feb 1873, Stadsarcheif Amsterdam, 650/20, 1873.

sent by Robertsons to Müller on 19 February detailing the price for which each estate had been sold, and assuring him that the debt had been discharged,[121] but the true identity of the Comtesse as purchaser was only reported to the Société by letter. Furthermore, the wording used by Robertsons to impart this information to the Société suggests that it was not known to Robertsons or the Société until the time of the auction. In the letter of 20 February 1873, Robertsons wrote that the Estates had been 'bought for £31.100 by Mr J. R. Sabonadiere [sic] nominally for Mr. John Boustead but really (so Mr J.R. Sabonadiere informs us), for Mrs. Cavendish.' [122]

3.2.3.3 Analysis of the facts surrounding the sale

The archive materials have provided much significant information. References in the law reports to the mechanism of the sale are at worst inaccurate, and at best insufficiently specific**.** The sale was a sale in execution, and the Estates were sold and conveyed by the fiscals under the authority of the Ceylon court.

The reason why the Estates were sold cannot be ascertained with certainty. There is much evidence suggesting that the sale represented a genuine attempt by the Société to realise its security. The general tenor and contents of the letters from Robertsons indicate strongly that the Société was much concerned with realising the security. There are numerous mentions of valuations, accounts and potential trial dates, but nothing is said of any arrangements with the Comtesse, and Boustead is not mentioned until after the auctions. Furthermore, the communications by telegram with Müller and Martin are all concerned with when the security might be realised

[121] ibid. In this letter, Robertsons transcribed the contents of the telegram in question.
[122] Letter from Robertsons to the Société, 20 Feb 1873, Stadsarcheif Amsterdam, 650/20, 1873. Similar wording was used in the letter of 19 Feb 1873: 'Mr Sabadoniere gave the name of John Boustead of London as the purchaser. He has intimated to us that the Estates are to be taken for the ultimate benefit of Mrs. Cavendish and her family'.

and for what value, suggesting, at the very least, indifference as to the Comtesse's interests. It is also relevant that there were apparently hostile acts by the Comtesse towards the Société and vice versa. The most obvious interpretations of the Comtesse's revocation of the 1863 power of attorney, the suit against the Comtesse, and the sequestration are that they are indicative of relations between the parties having deteriorated. Also, the Société's authorisation of Robertsons to bid for the Estates calls into question the extent to which the Société was concerned whether the Comtesse obtained them. Finally, if the sale of the Estates was arranged by the Comtesse with the Société in order to throw Cavendish off the scent, this was a very risky strategy. Owing to the extent to which sales in execution were regulated, there is little that the Comtesse and the Société could have done to have ensured that Boustead was the successful bidder at the auction.

This evidence notwithstanding, the possibility that the Comtesse, perhaps through her influential friends on the Continent, engineered the sale, or at least the transfer of the mortgage from Barings, cannot be ruled out. She may, for example, have had some means by which she could influence the Société's French holding company, and she could have induced the Société to take the mortgage from Barings in anticipation of her divorce, although significantly, Cavendish seems to have acquiesced in the transfer of the mortgage.[123] Furthermore, the apparent hostility between the Comtesse and the Société may be interpreted in a different manner. Her original solution, of having Duff and Boustead take an assignment of the mortgage, is likely to have been unsatisfactory to her as mortgages were required to be registered in Ceylon, and were thus open to public inspection.[124] Therefore, a

[123] Cavendish was a party to the deed of assignment, albeit 'solely for the sake of conformity' (certified copy of the deed, 28 Dec 1863, Baring Archive, HC6.3.7, 1684.
[124] Taylor, 'Registration of Title Deeds' (n 29) 349, 351 and 354-355.

judicial sale would likely have suited her needs. Her revocation of the 1863 power of attorney may have been intended to prevent Cavendish from obtaining a court order against Robertsons requiring them to comply with the 1868 decree and convey the Estates to the trustees. It is also possible that the suit and/or the sequestration were part of an elaborate (and expensive) ruse designed to convince Cavendish that the Estates were lost. A point worth noting is that the French Second Empire fell in 1870. It is possible that the Comtesse had sufficient influence to procure the transfer of the mortgage to the Société in 1863, but that by 1871, when the Société took steps to enforce its security, her political support had fallen away, at least in France.[125]

One development that has not been mentioned thus far is that, according to one of the law reports, immediately upon obtaining the Estates free from the original mortgage, Boustead remortgaged them to the Société for £53,000.[126] His initial outlay was therefore £4,942. It seems odd that the Société, having just sued the Comtesse, and knowing that Boustead had agreed to purchase the Estates for her, would lend £53,000 to him and become mortgagees of the Estates. The re-mortgaging may thus be interpreted as evidence that the judicial sale was engineered by the Comtesse and the Société in order to thwart Cavendish's designs. It is possible, however, that the re-mortgaging was motivated by genuine business considerations. The Société had seemingly come out of liquidation by 1873, and it continued trading for another five years. It is also very probable that, subsequent to the Société's demise, its business interests in Ceylon were continued by subsidiaries or associated banks. The colonial interest rates were very favourable for lenders at

[125] It seems that her husband's influence was much reduced after the advent of the Third Republic (see n 73, above). Of course, France's defeat in the Franco-Prussian war brought about the fall of her friend Napoleon III and the Second Empire.
[126] *Rochefoucauld* (n 67) 1915 (Lindley LJ).

the time,[127] and the estates were capable of producing revenues of approximately £10,000 per year.[128] Also, the Société was a mortgagee in possession prior to the sale to Boustead.[129] After the sale, Boustead remained in possession (through agents) and managed the Estates. Therefore, the Société, having re-mortgaged to Boustead, would have been able to claim the revenues from the Estates without the trouble of managing them. Therefore, it is not inconceivable that a short term, high interest loan, secured by a mortgage granted on its own terms, rather than those of Barings, was an attractive business prospect for the Société. It should also be noted that, by 1878, Boustead had mortgaged the Estates to mortgagees other than the Société for more than £70,000.[130] This strongly suggests that the mortgage granted by Boustead to the Société was a short term one, because had any significant sums been outstanding on the 1873 mortgage, there would have been insufficient equity in the Estates for them have been mortgaged for any sum approaching £70,000.

The Comtesse's admission of debt at the last minute seems extraordinary. One can only speculate as to her motives. Of course, the debt *was* outstanding, and the mortgage was indisputably valid, so she must have known that, had she not filed the admission, the court would almost certainly have found against her, presumably with increased costs. But she could have co-operated with the Société at the outset, and acquiesced in a sale of the Estates,[131] thus avoiding what must have been a costly court action, and also the risk of losing the Estates at a public auction. Her record in

[127] See *Rochefoucauld* (n 117) 75.
[128] According to the accounts of the 1870-71 season (sent by letter dated 18 Aug 1872 by Robertsons to the Société, Stadsarcheif Amsterdam, 650/20, 1871), the net profits were £9600. Cavendish's letter to Barings (15 Jan 1872, Baring Archive, HC6.3.22.13, 1872) also states that the profits from the Estates for 'the last 3 years' were 'about £10000 per annum'.
[129] The letter from Robertsons to the Société of 12 Feb 1872 (Stadsarcheif Amsterdam, 650/20, 1872) refers to the Société as 'already being in possession as mortgagees'.
[130] *Rochefoucauld* (n 2) 198.
[131] According to Lee, *An Introduction*, (n 30), 'The mortgaged property may be sold without an order of Court with the consent of the debtor ; but an agreement for extra-judicial sale contained in the mortgage deed will not be enforced if the debtor afterwards objects'.

respect of dealings with the English courts suggests a disdain for court orders; she may therefore have failed to take the suit seriously until the day of the trial. The suspicion remains, however, that she wanted the sale in execution to be ordered, as this would be an especially effective means of convincing Cavendish that the Estates were lost. This view is strengthened by the fact that she retained the services of the Deputy Queen's Advocate of Ceylon from at least as early as 1871 until her admission of debt, at which time his services were released to the Société. This suggests that she did in fact take the proceedings in Ceylon seriously from the outset, and shows that she was prepared to pay for expert legal advice until the outcome that she desired had been ensured. Furthermore, assuming that she followed her advocate's advice, it is difficult to believe that there was no compelling reason for leaving the admission of debt until the trial.[132]

A final point to make is that the Comtesse is the person who stood to gain the most from the rumours which deterred bidders at the auction. There is no evidence that Cavendish was a bidder, and the Société was seemingly concerned only with repaying the debt. Furthermore, the rumours were essentially without foundation. Cavendish's annuity was not large, and could only have been claimed had he outlived his former wife. As for the alleged claims of the children, they were probably founded on the 1868 decree, and likely could not have been pursued against an outsider purchaser under a judicial sale.[133] Therefore, the possibility that the Comtesse, perhaps through Sabonadière, was responsible for propagating these rumours cannot be ruled out.

[132] In a letter from Robertsons to the Société, 18 Aug 1871, Stadsarcheif Amsterdam, 650/20, 1871, it is stated that the Deputy Queen's Advocate, Mr Cayley, had been retained by the Comtesse.
[133] Of course, following a sale in execution, the children could not have pursued their claim against any purchaser of the Estates other than the Comtesse herself.

Overall, there is no direct evidence that the Société, when obtaining the sale in execution, was motivated by anything other than a genuine intention to recall its security. It is submitted that the most likely explanation is that the Comtesse was a clever and determined opportunist. She had for many years assisted in managing the financial affairs of the Baron and Baroness, so she had much experience dealing in legal and financial matters.[134] Thus, she may well have directly or indirectly engineered the transfer of the mortgage to the Société. When, after its change in management, the Société made clear its intentions to realise the security, she likely saw this as an opportunity to put an end to Cavendish's attempts to obtain the Estates and obtain control of them free from his interference.

3.2.4 The Aftermath of the Sale

3.2.4.1 Cavendish abandons his claim

The sale of the Estates to Boustead seems finally to have extinguished Cavendish's hopes of acquiring them. Of course, the fact that no trust appeared in the deed of conveyance to Boustead means that, even if he had inspected the title deeds in Ceylon, he would not have discovered the trust. In 1874, the Comtesse and Cavendish reached a compromise, and the 1868 decree was lifted, at least in respect of his claim.[135] There is no evidence that, after the sale, Cavendish sought to pursue his claim to the annuity. It is possible that he forfeited this interest under the 1874 compromise. As has been indicated, however, the annuity was relatively insignificant, and it is quite possible that all of Cavendish's threatened and actual

[134] See *Cavendish* (n 31) 11. Furthermore, in Rumbold, *Recollections* (n 36) 92, the Comtesse is described as having been Baron Delmar's 'most trusted private secretary'.
[135] *Rochefoucauld* (n 67) 1914 (Lindley LJ).

claims based on the annuity and the 1868 decree amounted to a bluff, particularly given that he seems not to have possessed the finances necessary to pursue any of his claims outside of England.

3.2.4.2 Boustead's betrayal and the fate of the Estates

The Comtesse's plans began to unravel soon after the sale to Boustead. The law reports provide detailed information here, which is based on correspondence to which the court had access. Boustead mortgaged the Estates on three occasions, in 1876, 1877 and 1878 for a sum of over £70,000.[136] In 1879, Boustead and Co was liquidated, and Boustead was declared bankrupt.[137] Although he was discharged in 1880, some parts of Estates were, in that year, conveyed to his trustee in bankruptcy and subsequently sold. It seems that other parts of the Estates had, by this time, already been sold by mortgagees.[138] The parts which were retained were sold at some time after 1882.[139] The precise point at which Boustead decided to abandon the parol arrangement cannot be pinpointed, but it does seem that he initially recognised the Comtesse's interest. The two remained in communication throughout the 1870s, and Boustead made regular payments to the Comtesse out of the profits of his firm, prior to its liquidation, despite his having mortgaged the Estates without her knowledge or consent.[140] After Boustead's bankruptcy, the Comtesse wished to claim the Estates from his trustee in bankruptcy,[141] but was persuaded by her solicitor and by Boustead, that it might be better to avoid any potentially expensive litigation and instead wait and see whether Boustead could reach some sort of

[136] *Rochefoucauld* (n 2) 198.
[137] *Rochefoucauld* (n 67) 1913; *In Re Price* (n 7).
[138] *Rochefoucauld,* ibid 1913.
[139] *Rochefoucauld* (n 2) 210.
[140] ibid 198.
[141] See *Rochefoucauld* (n 2) 198.

settlement with his creditors and retain the parts of the Estates that had not already been sold.[142] Although Boustead was initially optimistic that such a settlement could be reached, on 25 November 1892, he wrote to the Comtesse telling her that his previous advice not to 'despair' was no longer appropriate.[143] Other than a letter that the Comtesse sent, dated 17 December 1887, to Boustead's solicitor claiming ownership of the Estates, there were no further developments until 24 October 1894 when the Comtesse commenced the action in the English courts.

3.2.4.3 The coffee rust fungus

Boustead's behaviour must be understood in the context of a biological catastrophe which ravaged Ceylon's coffee plantations. In 1869, a fungus which attacks coffee plants was discovered in Ceylon. This 'coffee rust fungus' intermittently devastated Ceylonese coffee plantations during the early 1870s[144]. The fungus initially affected some estates to a far greater extent than others, and had the peculiar quality of appearing to die out only to return and check the recovery of the crops. Thus, entrepreneurs continued to purchase tracts of rainforest for conversion into coffee plantations, and in 1873, the year of the sale to Boustead, new land was selling at 'unprecedented prices',[145] whilst at the same time, 'planters were expressing grave concern about the impact of the disease on their crops.'[146] As the 1870s progressed, the fungus took hold, and by the mid-1880s, the coffee industry in Ceylon had been almost completely annihilated.[147]

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[142] *Rochefoucauld* (n 67) 1918 (Lindley LJ).
[143] *Rochefoucauld* (n 2) 199.
[144] See generally J S Duncan, *In the Shadows of the Tropics: Climate, Race and Biopower in Nineteenth Century Ceylon* (Ashgate, Aldershot 2007) Chapter 7, entitled 'Landscapes of Despair: The Last Years of Coffee'.
[145] ibid 172.
[146] ibid.
[147] See *Rochefoucauld* (n 2) 199.

The fungus, which was the root cause of Boustead's bankruptcy and the collapse of his firm,[148] was apparently slow to inflict terminal damage upon the Estates, but the consequences were devastating when it finally took hold. In Boustead's letter of November 1882, he explains that, by then, the fungus had 'reduce[d] the annual yield from the 50,000 tons at which it once stood to 14,000 tons estimated for the coming year'.[149] Given the initially unpredictable nature of the fungus, it may well have been that Boustead mortgaged the Estates in second half of the 1870s in the hope that the Ceylon coffee industry would recover and, even after his bankruptcy, it may not have been unreasonable for him to have hoped for an improvement. Once the gravity of the catastrophe finally became clear to Boustead, it may well have been that he decided to keep for himself whatever funds he had managed to salvage from the bankruptcy and the liquidation of his firm.

3.2.2.1 The Comtesse's delay

In 1894, the Comtesse commenced an action to recover the proceeds of sale of the Estates from Boustead, whose presence in London provides a ready explanation as to why she sued in the English courts. It seems at first odd that the Comtesse, having fought so hard to keep the Estates from falling into Cavendish's hands, abandoned her claim for many years. Her reasons were addressed by Lindley LJ in response to Boustead's defence of laches. Lindley LJ concluded that she had been encouraged until at least 1882, in part by Boustead, to refrain from litigating in the hope that he could retain the Estates.[150] He also held that she had done nothing to

[148] ibid 198-199.
[149] ibid 199.
[150] ibid 210.

suggest that she had abandoned her right, and that, because lapse of time alone would not permit the court to invoke the doctrine of laches and deny relief, there was no need to examine her 'excuses… for not instituting proceedings sooner.'[151] Her counsel claimed that in '1884 the Comtesse could not get solicitors to take up the case on account of her impecunious position'.[152] It may well have been that she had other reasons, however. It is perhaps significant to note that Cavendish died in 1889.[153] Despite the Divorce Court's decree having been lifted in 1874, Cavendish may still have possessed the right to the annuity if he outlived the Comtesse. Additionally, it is not inconceivable that he might have commenced some legal action against the Comtesse if he had discovered the manner in which she had deceived him into thinking the Estates lost. It would therefore have been prudent on the Comtesse's part to refrain from suing, particularly in the English courts, until after 1889. It is also worth noting that the Comtesse's daughter was a co-plaintiff in the action. There is no evidence that the 1868 decree was lifted in respect of the claims of the Comtesse's children. Furthermore, it was noted in one of the law reports that the daughter 'was interested in a sum charged on the Comtesse's interest in the estates by order of the Divorce Court'.[154] It is therefore not inconceivable that the daughter became aware that her mother was, or claimed to be, the beneficial owner of the proceeds of sale of the Estates and either requested to join as co-plaintiff or pressured her mother to sue.

[151] ibid 212 (Lindley LJ).
[152] ibid 203.
[153] <http://thepeerage.com/p1028.htm#i10276> accessed 25 July 2014.
[154] *Rochefoucauld* (n 117) 75.

3.2.5 Conclusions on the factual analysis of Rochefocuauld

The research undertaken for the purposes of this part of the thesis has revealed that the facts of *Rochefoucauld* were reported rather imperfectly, and that no subsequent commentators accurately discovered the facts until the research elucidated above was carried out. Perhaps the most significant finding is that, contrary to what was reported, the Estates were sold by officers of the District Court in Ceylon as a result of the Société having successfully sued the Comtesse for a sale in execution. The conveyance of the Estates was a conveyance by operation of law, executed by the fiscal. In no sense was it a conveyance from the Comtesse. Had Boustead indicated to her that he planned to purchase the Estates for himself, in defiance of the parol agreement, there is little that she could have done to have prevented him. Lacking the funds to redeem the mortgage, she could not have prevented the suit against the will of the Société, and once the court had ordered the sale, she could not have prevented the Estates from being sold at auction even with the Société's acquiescence. Of course, as has been established, the Comtesse *did*, at least ultimately, wish the sale to Boustead to go ahead. She clearly relied on the parol agreement with Boustead as crucial to her designs. But it cannot be said that she transferred the land to Boustead in reliance on the parol agreement. Neither can it be said that the Société conveyed the land in reliance on the agreement. The evidence suggests that the sale was procured by the Société in order to realise its security and, in any case, neither the auction nor the sale were conducted by the Société. This shows that the fraud which prompted equity's intervention does not depend on the transferor having relied on, or even been aware of, the parol agreement.

Putting these findings within the context of the rest of the chapter, *Rochefoucauld* falls clearly into the third category of parol agreement trusts. A (the fiscals of the Ceylon District Court) conveyed the land to B (Boustead) subject to a parol agreement entered into between B and C (the Comtesse) whereby B would take as trustee for C. A was almost certainly unaware of the parol agreement, and was certainly not influenced by it.

3.3 The Extent to Which the Prevention of Fraud Underpins the Enforcement of Category Three Parol Agreement Trusts

3.3.1 Equitable fraud within the context of cases within the Rochefoucauld line

The first case within this line is one in which the court refused to issue a decree in C's favour. In *Bartlett v Pickersgill,*[155] property was sold by a vendor to Pickersgill subject to an oral agreement made between Bartlett and Pickersgill that Pickersgill would hold the property on trust for Bartlett. Henley LK held that because the defendant had provided the purchase money, there could be no resulting trust and that, as the mere refusal by the defendant to perform the parol agreement did not amount to a fraud, s7 of the Statute of Frauds prevented the oral agreement from being enforced. In *James v Smith*,[156] Kekewich J found himself bound by *Bartlett*, albeit *obiter.* It is perhaps unsurprising, therefore, that, in *Rochefoucauld* at first instance, Kekewich J refused to rule in C's favour.

Kekwich J's judgment was famously overturned on appeal. The Court of Appeal famously justified the enforcement of the trust against Boustead on the ground that:

[155] (1759) 1 Eden 515, 28 ER 785.
[156] [1891] 1 Ch 384, Ch.

> the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself.[157]

As is discussed in detail below, the existence and legitimacy of the principle that the Statute of Frauds could not be used as an instrument of fraud was extremely well established by 1896.[158] Other than stating that the case was 'one of fraud',[159] however, Lindley LJ declined to elaborate on what sort of conduct amounted to fraud. The fact that circumstances antecedent to, and surrounding, the sale of the Estates were not reported fully in the law reports suggests that much of what has been explained here was unknown to the judges involved. It may however be that the judges had more awareness of what happened than is revealed in the reports, but considered that some of the details were unimportant to their decision-making process.[160] Furthermore, at first instance, Kekewich J ruled that some evidence which the Comtesse had wished to adduce, which was to be provided by Duff's solicitor, concerning the negotiations involving Duff and Boustead, was privileged.[161] This may account in part for the lack of detail in the reports.[162]

Fortunately, however, Lindley LJ cited several authorities in support of his assertions regarding the fraud issue, and to demonstrate that *Bartlett* was no longer good law. Moreover, most of these authorities, being cases concerning category one parol agreement trusts, have been covered above in Chapter Two of this thesis. Lindley LJ

[157] *Rochefoucauld* (n 2) 206 (Lindley LJ).
[158] Lindley LJ makes this point himself, ibid 206. See Chapter 2 of this thesis.
[159] ibid 207 (Lindley LJ).
[160] ibid 205. Lindley LJ commented that 'the circumstances under which the Delmar estates were conveyed to the defendant are to be gathered from the verbal testimony of the plaintiff, the defendant, and Mr. Duff, and a mass of correspondence both before and after the conveyance.' In *De La Rochefoucauld v Boustead*, The Times, 24 June 1896 (Ch) 17, it is reported that 'there was a vast amount of correspondence, which had been gone into at great length'. It is perhaps unlikely that this correspondence did not refer to the nature of the sale.
[161] *Rochefoucauld v Boustead* (1896) 65 LJ Ch 794, 794.
[162] Note that this point was not contested in the appeal to the Court of Appeal.

cited *Booth v Turle,*[163] *Davies v Otty (No 2)*,[164] *Haigh v Kaye,*[165] and *Re Duke of Marlborough*[166] in support of his judgment. Lindley LJ explained that these authorities were cases of fraud because, prior to the conveyance, the plaintiff and the defendant had orally agreed that the plaintiff would take the beneficial interest in the land upon completion of the conveyance. The fraud lay in the defendant knowingly reneging upon the agreement after having taken the conveyance. The Court of Appeal evidently did not regard as significant the fact that, in these cases, but unlike in *Rochefocuauld* itself, A transferred the land in reliance on the parol agreement. This very strongly suggests that the justification for the enforcement of the trust in *Rochefoucauld* is identical to the justification for the enforcement of category one parol agreement trusts, and that fraud which prompts equity's intervention in cases of this type, and which, according to *Rochefoucauld*, drives the principle that equity will not permit a statute to be used as an instrument of fraud, does not depend on the transferor having been hoodwinked into transferring his land.

Further strengthening these conclusions is the fact that in *Booth, Davies* and *Haigh*, as well as in *Rochefoucauld* itself, *Lincoln v Wright*[167] was expressly followed. In this case, the plaintiff's land was sold to Wright by a mortgagee in exercise of a power of sale. The mortgagee had been threatening to exercise the power, so Wright and the plaintiff had orally agreed that Wright would buy the land and subsequently allow the plaintiff to remain in possession and retake title once the purchase money had been repaid to Wright. The defendant, Wright's next-of-kin, sought to evict the plaintiff. It

[163] (1873) LR 16 Eq 182, Ct of Chancery.
[164] (1865) 35 Beav 208, 55 ER 875.
[165] (1872) LR 7 Ch App 469.
[166] [1894] 2 Ch 133, Ch.
[167] (1859) De G & J 16, 45 ER 6.

was held that the parol agreement between the plaintiff and Wright amounted to an equitable mortgage, notwithstanding that the formality requirements of the Statute of Frauds had not been complied with.[168] Turner LJ stated that:

> the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the Plaintiff and Wright the transaction should be a mortgage transaction, it is in the eye of this Court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud.[169]

Turner LJ's judgment is striking in its similarity to that of Lindley LJ, particularly in respect of the routine manner in which the defendant's conduct, in similar circumstances, was deemed a fraud.[170] Also notable for the purposes of the arguments advanced in this thesis is the fact that Turner J emphasised the need to find a parol *agreement*. A mere declaration of trust by A or B is evidently insufficient to justify the imposition of a parol trust of land. It seems to have been widely understood in the nineteenth century that entering into a parol agreement of this nature prior to the conveyance and knowingly reneging thereupon after the conveyance amounted to a fraud.[171]

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[168] Equitable mortgages (except for those created by deposit of title deeds) fell within the scope of s4 of the Statute of Frauds, and therefore were required to be agreed in writing and signed by the grantor.
[169] *Lincoln* (n 167) 22 (Turner LJ). Note that Knight Bruce LJ upheld the parol agreement on the grounds that it had been partly performed, but he also suggested (21) that, were it not for the part performance, the Statute still would not have applied.
[170] Although Knight Bruce LJ held that the agreement could be enforced pursuant to the doctrine of part performance he also agreed with Turner LJ that the defendant could not rely on the Statute of Frauds because his conduct amounted to 'an unjustifiable attempt to defeat or evade a fair agreement'.
[171] W Swadling 'The Nature of the Trust in *Rochefoucauld v Boustead*' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart, Oxford, 2009) 106 argues that the fraud in *Rochefoucauld* was not Boustead 'reneging on his promise', but his 'reliance on the statute'. *Rochefoucauld* itself and the other authorities cited in this section suggest otherwise. Boustead's conduct amounted to a fraud, and the statute could not be utilised as a tool to legitimise this fraud.

Another case which seems to fall within the *Rochefoucauld* line is *ex parte Norton*.[172] The case concerned a yacht which belonged to Sir Richard Mansel (C). He mortgaged it and in 1880, it was sold by the mortgagee (A). It was purchased at the sale by Norton (B, who, at the time, was solicitor and 'confidential advisor' of Mansel). In 1883, C filed a liquidation petition. The trustees in liquidation claimed that the yacht had been purchased by B on secret trust for C. The Registrar upheld the trustees' claim. B appealed. The Court of Appeal dismissed the appeal on the ground that the evidence showed that B had bought the yacht for C and that, even if the evidence had not shown this to have been the case, C was beneficially entitled to the yacht on account of the 'confidential relations' between them and 'other arrangements'. Interestingly, the case was referred to as a 'secret trust', although the context in which it arose was clearly different from the factual background to conventional secret trusts. Although there might have been a declaration of express trust, this would seem unlikely, because, as in *Rochefoucauld*, prior to the transfer to B subject to the trust, neither B nor C had title to the yacht. It would therefore seem very likely that this represents an unusual example of a trust arising out of a parol agreement which, like that in *De Bruyne*, did not concern land.

It should at this point be reiterated that in neither *Rochefoucauld* nor *Lincoln* was the question of detrimental reliance raised, nor was the question of whether the plaintiffs could have obtained the land via other means had the parol agreement not been entered into even mentioned. A recent example of a case within this class in which issues concerning detrimental reliance were raised is *Samad v Thompson.*[173] The defendants, Thompson and his wife, can be regarded as B. The claimant, C wished

[172] The Times, May 12 1884 (CA) 5.
[173] (n 9).

to purchase some land from A, but he had a very poor credit rating as a result of a previous period of imprisonment, and was thus unable to obtain a secured loan to assist with his purchase. It was therefore agreed between B and C that the land would be purchased in B's names. The purchase would be facilitated by obtaining a loan by mortgaging the land in the names of B. C would pay the initial deposit and would meet the mortgage repayments and all other associated costs. Once the mortgage was discharged, B would convey the land to C. The purchase went ahead as planned but, having secured title, B sought to renege on the parol agreement and retain the land for themselves. Although B was held to be trustee for C, Sales J downplayed the role of fraud as explained in *Rochefoucauld,* holding instead that the 'foundation' of C's claim was his 'significant acts of detrimental reliance',[174] and that the case was to be determined on the principles relating to 'common intention' constructive trusts of the family home.[175] It is submitted here, however, that, as *Samad* is indistinguishable on its essential facts from *Rochefoucauld,* Sales J ought to have been bound by higher authorities to recognise the centrality of fraud to his reasoning.[176]

3.3.2 Equitable fraud within the context of cases within the Pallant line

The cases in this line are sometimes described as being authorities concerned with the '*Pallant v Morgan* equity'. They are cases in which B and C, both being interested in obtaining different parts of a single estate, agree that B will purchase the land from A and then forfeit part of it in C's favour. It should be noted that here, the parol agreement might potentially amount to an oral contract for the sale of land.

[174] ibid 128 (Sales J).
[175] See below, 5.2 for discussion of 'common intention' constructive trusts.
[176] The same applies to *Cox v Jones* [2004] EWHC 1486 (Ch), [2004] 2 FLR 1010 in which it was held that B had purchased a flat on behalf of C.

Section 4 of the Statute of Frauds 1677 required such contracts to be in writing. A similar provision is now found in s2(1) of the Law of Property (Miscellaneous Provisions) Act 1989.[177] Hence, the statutory provision which, but for equity's intervention, could render the parol agreement ineffective is s2(1) of the 1989 Act rather than s53(1)(b) of the Law of Property Act 1925. In *Chattock v Muller,*[178] it was made clear that s4 of the Statute of Frauds could not stand in the way of the court's jurisdiction to relieve in cases of fraud. It should be noted, however, that the parol agreements in cases in this line tend to concern agreements to enter into future contractual agreements. Hence, the parol agreement is usually too vague to amount even to a parol contract.

The earliest case in this line is *Chattock v Muller,*[179] in which B and C, having both been interested in purchasing different parts of the same estate, agreed that B would purchase the estate in his own name from A and would subsequently sell certain parts thereof to C, although the exact extent of these parts was not entirely clear. Malins VC held that:

> [B] had lulled [C] into not making an offer for the estate... [B] was all the time leading [C] to believe that if he bought the property [C] should have the part he wanted. Otherwise he ought to have told [C] not to rely upon him, and that if he wanted any part of the estate he must bid in competition with him… [B] was… no longer at liberty to change his mind.[180]

[177] The only material difference is that the 1989 Act, a2(5) expressly exempts 'resulting, implied or constructive trusts' from the ambit of s2(1). There was no similar provision in the Statute of Frauds. NB: prior to the 1989 Act taking effect, contracts for the sale of land were governed by s40 of the Law of Property Act 1925. There was no provision in the 1925 Act which was the equivalent of s2(5).
[178](1878) LR 8 Ch D 177
[179]ibid.
[180](n 178) 180 (Malins VC).

He went on to state that B's denial of the agreement amounted to '[a] flagrant breach of duty, which in this Court has always been considered as a fraud'[181]

The next case is *Pallant v Morgan,*[182] in which the purchase was at an auction, to which both B and C dispatched agents. Although discussions between B and C had already taken place, it was only at the auction that it was finally agreed that C's agent would refrain from bidding so long as B would subsequently sell part of the land to C.[183] Harman J, following *Chattock,*[184] held B to be trustee for the prevention of fraud.[185] The fraud lay in B reneging on the parol agreement upon which C had relied. It is notable that B's agent had authority to bid up to £3,000 and C's only to £2,000. It is therefore arguable that C did not suffer any detriment as he would have been outbid had he not entered into the arrangement. This, however, was not deemed relevant by the court.

In recent years, 'joint purchase' trusts have been enforced in cases where the agreement did not relate to land, most notably *Banner Homes v Luff Developments*,[186] in which the parol agreement related to C's acquisition of some shares in a wholly owned subsidiary of B. The subsidiary purchased the land in question. Chadwick LJ, giving Court of Appeal's judgment, did not mention fraud, and held that a constructive trust over the shares arose out of the '*Pallant v Morgan* equity', which applies to joint purchase cases when C's reliance on the parol

[181]ibid.
[182](n 3).
[183]In respect of the parol agreement, s40 of the 1925Act was mentioned by the defence but not actually relied upon. This section, since repealed and replaced by s2 of the Law of Property (Miscellaneous Provisions) Act 1989, required that contracts for the sale of land were required to be in writing signed by the relevant parties. On the facts, it was held that there was no agreement sufficiently certain to be specifically enforced, so the section would not have been relevant even had it been pleaded.
[184]This makes it odd that *Chattock* is often ignored when the joint purchase cases are discussed. See, for example *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752.
[185]*Pallant* (n 3) 88 (Harman J).
[186] (n 9).

agreement causes 'advantage to [B], or detriment to [C]'.[187] It is submitted, however, that the principles governing such cases had long been settled and that there is no logical justification for separating the joint purchase cases from cases such as *Rochefoucauld* on the ground that the former, unlike the latter, involve a parol agreement relating to part rather of, rather than the whole, beneficial interest in the property.[188] Furthermore, it should be noted that, in *Bannister v Bannister*, it was held by the Court of Appeal that *Chattock* had been decided on the same principles as *Booth, Marlborough* and *Rochefoucauld*. [189] It is therefore submitted that the most plausible explanation for equity's intervention in the 'joint purchase' cases is the prevention of fraud.

3.3.2.1 Agency: an alternative explanation for the '*Pallant v Morgan* equity' cases

It should be recognised that the 'joint-purchase cases' are sometimes asserted to be conceptually distinct from cases such as *Rochefocuauld* on the ground that B's liability springs from his breach of a fiduciary relationship.[190] There is some historical support for this view. In *Chattock,* Malins VC stated that B had 'unquestionably purchased [part of the estate] as the agent of [C].'[191] It is thus not unreasonable to regard at least some of the joint purchase authorities as cases of agency. What is not always appreciated, however, is that, in the nineteenth century, the boundaries between agreements giving rise to agency and agreements giving rise to trusts were apparently not well-defined. For example, in *Rochefoucauld*, a case almost always regarded as one concerning a trust and not an agency agreement, the plaintiff's case

[187]ibid 398 (Chadwick LJ).
[188]For an example of the 'joint purchase' cases being separated on principle, see Hopkins 'The *Pallant v. Morgan* "Equity"' (n 4). See also *Crossco* (n 9) [88] (Etherton LJ).
[189]*Bannister v Bannister* [1948] 2 All ER 133, CA.
[190] *Crossco* (n 9) [95] (Etherton LJ). See also *Du Boulay v Raggett* (1989) 58 P & CR 138, Ch.
[191] *Chattock* (n 178) 181. See Hopkins 'The *Pallant v. Morgan* "Equity"' (n 4) for examples.

was that B 'had bought the property as agent for her'.[192] Moreover, in *Adaicappa Chetty v Asaicappa Chetty*,[193] *Rochefoucauld* was described as a case in which 'it was clearly proved that the person who purchased the property was acting as the agent of the other party.'[194] Furthermore, in *Chattock*, Malins VC cited *Booth v Turle* as an authority,[195] even though that case was decided purely on trust principles by Malins VC *himself* with no mention of any agency agreement. This peculiar lack of precision is understandable when it is considered that nineteenth century equity judges considered a breach of an agency agreement which involved the agent misappropriating trust property to be a fraud. Thus, if A conveyed title to land to B in circumstances where B had orally agreed to take as agent for C, and then B sought to keep the land for himself in defiance of the agency agreement, this was a fraud, and a trust would be enforced in favour of C. It was not open to B to argue that the lack of written evidence prevented the finding of a trust; to do so would be to use s7 as an instrument of fraud.[196] Indeed, according to *Bowstead and Reynolds on Agency*, this is still the position in the modern law.[197]

As for the most appropriate explanation of the 'joint purchase' cases in the modern law, it has been pointed out by Hopkins there are question marks as to the extent to which fiduciary duties could and should be imposed in commercial contexts.[198] Furthermore, the same author has highlighted that the requirements necessary to prove a fiduciary relationship and a breach thereof are not the same as those

[192] *Rochefoucauld* (n 67) 1913.
[193] (n 26).
[194] ibid 420 (Viscount Haldane, delivering the Board's judgment).
[195] (n 178) 180.
[196] See the explanation offered by Jessel LJ in *Cave v Mackenzie* (1877) 46 LJ Ch 564, 567. See also Liew, '*Rochefocuauld v Boustead* (n 4).
[197] P Watts and F Reynolds, *Bowstead and Reynolds on Agency* (20th edn, Sweet & Maxwell, London, 2014) 67.
[198] Hopkins (n 4) 46.

necessary to establish a constructive trust through other means.[199] Although the application of fiduciary duties within a commercial context is outside of the scope of this thesis, it is tentatively suggested that, in cases in which the parol agreement can be proven to have created an agency relationship, there is no objection to the imposition of a trust on the ground of a breach of fiduciary duty. This should not, however, obscure the weight of authority behind the proposition that, regardless of whether or not a pre-existing fiduciary relationship can be established, B may be made trustee in the 'joint purchase' cases on the ground of fraud. Although it has been held that, in commercial situations, even when there is no agency relationship, fiduciary duties may arise on the rather vague basis of 'particular and special features',[200] it would seem that the uncertainties involved in establishing such non-agency fiduciary relationships mean that this avenue for relief does not compare favourably with a solution based on the settled principles discussed in this thesis.

3.4 Fraud in Cases of 'Hybrid' Parol Agreement Trusts

3.4.1 Young v Peachy

The earliest of these cases is *Young v Peachy*,[201] an important case which has been referred to several times already in this thesis. *Young* represents somewhat of a hybrid between category 2 and 3 parol agreement trusts. Here, the father (B) of a married woman (C) became concerned that her husband (A), who took in right of her, would be declared bankrupt and that her interest in some land would consequently go to his creditors. He persuaded the daughter and the husband to assign the interest in his favour, subject to a parol agreement that he would resettle

[199] N Hopkins, 'The *Pallant v Morgan* Equity- Again: *Crossco No 4 Ltd v Jolan Ltd*' [2012] Conv 327, 331.
[200] E.g. *Crossco* (n 9) [88] (Etherton LJ).
[201] (1741) Atk 254, 26 ER 557.

the interest upon the daughter for her own separate use, thus insulating it from any future claims by the husband's creditors. The transfer was completed, but the father was himself declared bankrupt without having resettled the interest. The daughter's heirs successfully claimed the interest. As Lord Hardwicke explained, there had been 'a great many cases, even since the statute of frauds, where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud'.[202] Owing to the matrimonial property laws of the day, C had no interest in the property immediately prior to the conveyance. As A had transferred to B in reliance on an agreement between A and B that she should take an interest, C's position in *Young* can be equated with that of C in cases such as *Staden v Jones*. Unlike in *Staden*, however, C was a party herself to the parol agreement and is very likely to have relied upon it. In this latter respect, her position bears some similarities with that of C in cases such as *Rochefoucauld*.

3.4.2 Neale v Willis

Another interesting case is *Neale v Willis*,[203] in which a husband purchased the matrimonial home in his sole name using, in part, money which had been loaned to him by his mother-in-law on the understanding that the land would be purchased in the joint names of himself and his wife. The wife later successfully claimed a beneficial interest in the land. The Court of Appeal applied *Bannister*, which involved the same 'kind of fraud'.[204] Here, however, A (the vendor) conveyed the land to B (the husband) subject to a parol agreement made by B with D (the mother-in-law) that C (the wife) would take an interest. In *Bannister*, A relied on the parol agreement

[202] ibid 257.
[203] (1968) 19 P & CR 836, CA.
[204] ibid 840 (Diplock LJ). Denning LJ also followed *Bannister*. Sachs LJ agreed with both.

when conveying the land to B, so the parol agreement was a factor in inducing the conveyance to be made by A. Contrarily, in *Neale*, A had nothing to do with the parol agreement. The parol agreement with D, however, facilitated the conveyance. D clearly relied on the parol agreement, as she entered into contractual relations with B on the strength thereof. It was therefore a fraud for B to renege upon this parol agreement and take the conveyance in his sole name. *Neale,* therefore, is significant because it demonstrates the readiness of the courts to apply a long-established doctrine of equity to novel circumstances. This provides compelling evidence that all of the types of parol agreement trusts considered in this thesis are enforced pursuant to a single doctrine.

3.4.3 AM v SS: the most recent case of a parol agreement trust

3.4.3.1 The facts and judgment

AM v SS[205] is the third hybrid case. It is, at the time of writing, the most recent case in which a parol agreement trust was enforced, and it is also significant and interesting in several respects. The case concerned a matrimonial dispute. The husband (B) was part of a family of considerable means, the affairs of which were presided over by his father (D), a formidable patriarch described by Coleridge J as 'a very rich man'.[206] The purpose of the hearing was to establish the beneficial ownership of land which, according to the wife, belonged beneficially to B.

The land was registered in B's name. B's sister (C), who was the Intervenor in the hearing, claimed, alongside B and D, that the property was beneficially hers. The circumstances surrounding B's family becoming involved with the land were as

[205] [2014] EWHC 2887 (Fam).
[206] ibid [31]. In *AM v SS* [2014] EWHC 685 (Fam), concerning further issues arising from the divorce, Coleridge J [29] alluded in some detail to the father's domineering nature.

follows: C and her husband found the land and passed the relevant details to B. The vendor (A) then conveyed the land to B, the purchase money being provided by D. Afterwards, C wrote a letter to D, expressing her gratitude towards him, and proceeded to supervise some major refurbishments to the land. Thereafter, C regarded herself as the owner of the land.[207] Coleridge J accepted that one of the reasons for this peculiar arrangement was that D disapproved of C's choice of husband, and wished for the land to be out of his son-in-law's reach in the event of any future divorce proceedings. It was held that B had taken the land as constructive trustee for C, so that the wife's claim that B was beneficial owner was rejected.

Although counsel referred Coleridge J 'to many of the recent cases on resulting and constructive trusts',[208] including authorities concerned with 'common intention' constructive trusts,[209] he identified *De Bruyne* as the most relevant authority, also mentioning *Rochefoucauld* and *Bannister* as being relevant. He quoted extensively from *De Bruyne*, citing Patten LJ's comments regarding equitable fraud and parol agreement trusts,[210] before concluding that the situation in *AM* 'precisely fit[ted] the analysis in De Bruyne v De Bruyne'.[211] Accordingly, B took as constructive trustee for the C on the ground that, having taken title subject to an agreement to hold the land for the benefit of C, it would have been 'wholly unconscionable'[212] for B to have done otherwise. The reason for the informal nature of the arrangements, being based on an erroneous assumption (i.e. that the property would be put out of reach of C's husband), was immaterial to the finding of a constructive trust. At no point was

[207] She lived in the Property with her family, equipped the Property, assumed responsibility for all outgoings and took rent when it was temporarily leased.
[208] (n 205) [22].
[209] Coleridge J mentioned specifically [23] 'Lloyds Bank v Rossett [1990], Oxley v Hiscock [2004], Stack v Dowden [2007] [and] Kernott v Jones [2011]'.
[210] *De Bruyne* (n 9) [51].
[211] (n 205) [26].
[212] ibid.

it claimed or held that any trust had been evidenced in writing, as per the requirement of s53(1)(b) of the Law of Property Act.

3.4.3.2 The significance of *AM v SS* to this thesis

AM is an especially informative authority because it involves a very recent application of equity's fraud-based jurisdiction to a novel factual scenario. It also sheds light on the nature of the fraud which is the catalyst for equity's raising of a trust. Of all of the parol agreement trust cases, *AM* is most similar to *Neale*. In both, D demonstrably relied on the parol agreement, and B knew this to be so. Unlike in *Neale*, however, in *AM,* D actually purchased the land in B's name. Usually, the purchase of land in the name of another would trigger the application of resulting trust principles or a presumption of advancement. *AM* thus shows how circumstances sufficient to raise a trust for the prevention of fraud will override any presumptions relating to resulting trusts, thereby bolstering the conclusions reached above, at 2.2.3.2, regarding the relationship between resulting trusts and category one parol agreement trusts. *AM* also shows how equity's ability to intercede on the ground of fraud in cases concerning parol agreement trusts, in terms of the range of scenarios to which it may apply, is still evolving and is very much a part of the modern law of property, despite its ancient origins.

Strangely, in *AM,* Coleridge J did not mention *Neale*. Instead, he essentially permitted D to take the place of A in the reasoning supplied by Patten LJ in *De Bruyne* (perhaps because, unlike in *Neale*, in which B entered into a contract with D in order to obtain some of the purchase money, in neither *AM* nor *De Bruyne* did B purchase the trust property). This substitution is justifiable on the ground that D wholly facilitated the sale, and he did so in reliance on the agreement that B would

hold the property for C's benefit. Therefore, any attempt by B to avoid performing the agreement would have amounted to a fraud on D, as well as on C. Coleridge J's flexible approach is congruous with that of Patten LJ in *De Bruyne*, for Patten LJ cited cases distinguishable on their facts from *De Bruyne*, such as *Rochefoucauld*, in direct support of his analysis.[213]

AM is also significant as supporting the view that the prevention of equitable fraud justifies the imposition of the trust in cases of its type. Furthermore, *AM* is a useful authority concerning the nature of equitable fraud as has been elucidated thus far in this thesis. Coleridge J held that B was a constructive trustee for the prevention of fraud, even though he made no attempt whatsoever to renege upon the parol agreement. As has been emphasised throughout the course of this thesis, there are several similar authorities,[214] but *AM* goes further than most because B's claim was that he *was* bound by the trust arising out of the parol agreement.[215] As Coleridge J emphasised, the trust in *AM* was borne out of equity's response to the *danger* of fraud. It is also notable that Coleridge J did not consider whether C's renovation work or other contributions amounted to detrimental reliance. This provides support for the proposition that, in cases concerning parol agreement trusts, it is not necessary to prove detrimental reliance or loss by C.

3.5 The Classification of Category Three Parol Agreement Trusts

The proper classification of parol agreement trusts in the third category is rather difficult. Resulting trusts can be ruled out immediately. As a general rule, a resulting trust could only return the property to A. It is possible that C could acquire an interest

[213] *De Bruyne* (n 9) [51] (Patten LJ).
[214] See especially *De Duke of Marlborough* (n 166); *Young v Peachy* (n 196); *Bannister* (n 189); *Norris v Frazer* (1873) LR 15 Eq 318.
[215] *De Bruyne* (n 9) is similar in this respect.

under a resulting trust on the ground that he or she contributed directly towards the acquisition of the property (as C had done in *Samad*), but according to long-settled principles of resulting trusts, C's share would necessarily be quantified according to his proportional contribution to the purchase of the land. None of the cases covered in this section were decided on this basis.

The vexed question of whether category three trusts are express or constructive trusts cannot reasonably be approached without detailed consideration of the classification of the trust in *Rochefoucauld* for, as has been mentioned above, *Rochefoucauld* is the only case concerning a parol agreement trust in which the classification of the trust was considered in detail. Moreover, it is the only such case in which the trust was apparently described by the court as an express trust. Furthermore, it has been strongly argued by Swadling that the trust in *Rochefoucauld* should be classified as an express trust in the modern law.[216] In order to ascertain the meaning behind the Court of Appeal's apparent classification of the trust as express, a historical analysis will be carried out so that Lindley LJ's words can be understood within their proper context. It is anticipated that this analysis might also help to illuminate an important question which has been raised in the previous two chapters, namely that of why none of the trusts considered in this thesis were judicially identified as constructive trusts until the twentieth century at the earliest.

[216] Swadling, 'The Nature of the Trust' (n 171).

3.5.1 The classification of the trust in Rochefoucaud

3.5.1.1 Why was the classification a pertinent issue in *Rochefoucauld*?

It might be recalled that, in *Rochefoucauld,* one of B's defences was that C's lengthy delay in bringing her action meant that her claim was time-barred by the statutory limitation period. This defence raised, for the first time in the English courts, the question of whether a trust arising out of a parol agreement pursuant to the instrument of fraud principle should be classified as an express or constructive trust. By virtue of the Trustee Act 1888, s8(1)(a), the limitation period of six years[217] applied to actions against trustees. The provisions of s8 did not apply, *inter alia*, to claims 'to recover trust property or the proceeds thereof, still retained by the trustee'.[218] Because this was a claim against a trustee to recover the proceeds of the sale of the estates, s8 did not apply, and the Court of Appeal applied the law which had been developed prior to the enactment of the 1888 Act, the relevant statutory provision being the Judicature Act 1873, s25(2), which stipulated that no limitation period applied to claims by beneficiaries 'for any property held on express trust, or in respect of any breach of such trust'.[219]

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[217] The statutory limitation period which applied in respect of trusts was six years (or twenty years, in respect of claims of title to realty). The means by which this came about was rather complex. The original source of the six year period was the Limitation Act 1623, s3. Although this subsection did not expressly apply to actions in respect of trusts, the courts of equity, having reached the view that the general intention of Parliament was that stale claims were not to be permitted, held that, by analogy with the Limitation Act, the limitation period of six years applied in respect of claims against trustees, although not express trustees. Eventually, the Trustee Act 1888, s8(1) provided statutory confirmation that the limitation period prescribed in the Limitation Act 1623 should apply to trustees. See *Taylor v Davies* [1920] AC 626, PC for a general explanation.

[218] Trustee Act 1888, s8(1).

[219] The law of limitations as applied to trustees in the nineteenth century was complex. It seems that s8 of the 1888 Act partially repealed s25(2) of the Judicature Act because the limitation period could, after the enactment of s8, clearly be relied upon by all trustees in respect of claims for breach of trust. As s8 did not apply to claims to recover 'trust property, or proceeds thereof' from the hands of trustees, it seems that, in respect of actions to recover trust property, s25(2) remained in force. This is the view taken in A R Rudall, and J W Greig, *The Law of Trusts and Trustees under the Trustee Act 1888, The Trust Investment Act 1889 ,The Trustee Act 1893 Amendment Act 1894, and the Judicial Trustees Act 1896,* (2nd edn, Jordan & Sons, London 1898) 7. Section 25(2) appears to have been enacted as mere confirmation of a rule to the same effect, developed by the Court of Chancery (see Rudall and Greig, *The Law of Trusts and Trustees*, 5 for further detail on this point), whereby

It was held in *Rochefoucauld* that '[t]he trust which the plaintiff has established is clearly an express trust within the meaning of that expression as expressed in *Soar v Ashwell.*'[220] B's defence of the statutory limitation period was therefore unsuccessful. Although the Court of Appeal was setting a new precedent on this point, Lindley LJ's judgment suggests that the Lords Justices regarded the issue as straightforward. Without analysing the state of the law in the late nineteenth century and earlier, it is difficult to see why this was so. Also, it is not immediately apparent whether Lindley LJ regarded the trust as an express trust or a trust that was not an express trust but was to be treated as such.

3.5.1.2 The trust in *Rochefoucauld* cannot have been an express trust

In *Rochefoucauld*, the Court of Appeal held that 'the plaintiff has proved that the estates in question were conveyed to the defendant on May 27, 1873, upon trust for her'.[221] This means that the trust, if an express trust, must have been declared before legal title was vested in Boustead. Lindley LJ stated that in order for s7 of the Statute of Frauds be complied with, 'it is sufficient if the trust can be proved by some writing signed by *the defendant* [italics added]'.[222] This shows that the only potential settlor of the trust, if it was express, was Boustead.

At the time at which B made the declaration of trust, he had no title to the Estates. He thus lacked the capacity to settle the Estates on trust. According to the version of events accepted by the Court of Appeal, he indicated to C that *when* he obtained

time would run against constructive trustees but not express trustees. It seems that Lindley LJ applied the law in this manner. He stated (*Rochefoucauld* (n 2) 208) that Boustead was 'not able to claim the benefit of s.8 of the Trustee Act, 1888… and the statute which is applicable is the Judicature Act, 1873… s. 25, sub-s. 2'. The Trustee Act 1888 was certainly in force at the time of the judgment, for s8(3) of the same Act stipulated that the provisions were to 'apply to actions or other proceedings commenced after the First day of Jan., One thousand eight hundred and ninety'. The Comtesse's action was originally commenced in 1894.

[220] *Rochefoucauld* (n 2) 208 (Lindley LJ).

[221] *Rochefoucauld* (n 2) 205 (Lindley LJ).

[222] ibid 206 (Lindley LJ).

legal title to the estates, he *would* hold them on trust for her. The Court of Appeal held that the trust arose as a result of this agreement, which was reached prior to B obtaining the Estates.[223] There are no authorities to suggest that written evidence created *before* the alleged trustee obtained title to the property could satisfy s7.[224] For this reason, it is unlikely that Lindley LJ regarded the trust as an express trust in the usual sense of the phrase. Although Swadling argues that, when read as a whole, Lindley LJ's judgment can only reasonably be read as recognising the trust as an express trust,[225] it should be noted Lindley LJ described the case as an 'express trust' at only one other point in his judgment, and this was only after he had qualified the use of this term by explaining what he meant by an express trust within the context of the considerations in the case.[226]

3.5.1.3 How were parol trusts recognised under the instrument of fraud principle classified in 1896?

In order to understand the meaning of Lindley LJ's words, it is necessary to consider how, at the time of the judgment of *Rochefocuauld*, trusts arising out of parol agreements were usually classified. According to the analysis in Chapter Two of this thesis, parol agreement trusts were generally regarded prior to the twentieth century as trusts arising for the prevention of fraud. Nineteenth century judges did not ordinarily deem it necessary to categorise parol agreement trusts as express,

[223] This is made clear in *Rochefoucauld* (n 117) 76. Note that one of the Comtesse's assertions was that the correspondence between Boustead and her after the conveyance provided sufficient written evidence to satisfy s7. Lindley LJ, whilst conceding that this could well have been the case, found it unnecessary to make any definitive ruling on this issue because of the fraud.
[224] The circumstances in which s7 could be satisfied are covered comprehensively in Lewin, *A Practical Treatise*, 56.
[225] Swadling, 'The Nature of the Trust' (n 171).
[226] *Rochefoucauld* (n 2) 212. It might also be noted that Lindley LJ observed (196) that the instrument of fraud principle allowed 'proof of a fraud,' (described as proof of the trustee having knowingly taking subject to the trust and then denying it), as opposed to proof merely of the trust. This is not consistent with his having viewed the trust as a normal express trust. The instrument of fraud principle was explained in the same terms, as allowing proof of the fraud, by Turner LJ in *Lincoln v Wright* (n 167).

constructive or resulting. Because the prevention of fraud was a ground for equitable intervention and an established reason for the recognition and enforcement of a trust, no further classification was required. This was explained in detail by Lord Hardwicke LC in *Young v Peachy*.[227] Here, the plaintiffs originally claimed that B's assignees in bankruptcy held the interest for them by way of 'a trust resulting by operation of law'.[228] Lord Hardwicke explained that:

> the question is, whether… here is either a trust resulting by operation of law for the benefit of the daughter… or whether there is not a ground… to direct that the assignees, under the commission of bankruptcy… shall execute a reconveyance under the head of fraud.[229]

Lord Hardwicke held that 'there was no such trust [resulting by operation of law]',[230] but that the plaintiffs 'had proper ground to be relieved under the head of fraud'.[231] The Statute of Frauds could not be relied upon by the defendant because 'if that objection should be allowed, the statute would tend to promote frauds rather than prevent them'.[232] The defendant was therefore found to be a trustee[233] and ordered to convey the relevant property to the plaintiffs.

[227] (1741) 2 Atk 254.
[228] ibid 256.
[229] ibid 257.
[230] ibid (Lord Hardwicke LC).
[231] ibid 257.
[232] ibid 258.
[233] It should be noted that the only ground upon which the Court of Chancery could order a party to convey land to another was that the former had been held to be a trustee. See *Beckford v Wade* (1805) 17 Ves Jun 87, 34 ER 34, 96 (Grant MR).

3.5.1.4 Why Further Classification of Parol Agreement Trusts was Unnecessary: the narrow interpretation of ss7 and 8 of the Statute of Frauds.

If parol agreement trusts were understood in the nineteenth century and earlier not to be express trusts, it may seem odd that the courts did not classify them as constructive trusts so as to fall within the ambit of s8 of the Statute of Frauds, which exempted from the effect of s7 'a Trust or Confidence [which] shall or may arise or result by the Implication or Construction of Law or bee [sic] transferred or extinguished by an act or operation of Law'. After all, since the coming into force of the Law of Property Act 1925, parol agreement trusts have frequently been held to have been constructive trusts exempted from the requirements of s53(1)(b) of the Law of Property Act by virtue of s53(2) of the same Act.

What must be understood, however, is that whilst sections 7 and 8 of the Statute of Frauds were in force, the courts did not interpret s8 as applying to constructive trusts. Rather, s8 only exempted from the requirements in s7 some of the types of trusts which would now be classified as resulting trusts. This limited interpretation of s8 was implied in early cases,[234] and was stated expressly by Lord Hardwicke in the leading authority of *Lloyd v Spillit*:[235]

> in that Statute there is an Exception of Trusts arising by Operation of Law. But his Lordship said, that those have been but of two Kinds, either where the Conveyance has been taken in the Name of one Man, and the Purchase Money paid by another, or where the Owner of an Estate has made a voluntary Conveyance of it, and made a Declaration of the Trust with regard to

[234] E.g. *Kirk v Webb* (1698) Prec Cha 84, 24 ER 41; *Bellasis v Compton* (1693) 2 Vern 294, 23 ER 790.
[235] (1740) Barn Ch 334, 27 ER 689.

> one Part of the Estate, and has been silent with regard to the other Part of it.[236]

The Lord Chancellor went on to explain, however, that '[w]here there has been a Fraud in gaining a Conveyance from another, that may be a Reason for making the Grantee in that Conveyance to be considered merely as a Trustee.'[237]

This restrictive interpretation of s8 needs to be explained in light of the Statute of Uses 1536. Prior to the Statute, the Court of Chancery recognised that certain transactions, such as purchases of land in the name of a third party, would give rise to a resulting use. In such instances, the third party would take legal title for the use of the true purchaser. The Statute of Uses converted such resulting uses into legal estates by automatically vesting legal title in the true purchaser.[238] Once trusts came to be recognised by the Court of Chancery, the circumstances that would have given rise to resulting uses at common law were recognised by the Court of Chancery as giving rise to trusts by 'strict analogy to the rule of the *common law*.'[239] It is thus likely that Lord Hardwicke interpreted s8 of the Statute of Frauds, with its use of the phrase, 'by the Implication or Construction *of law* [italics added]*'* to extend only to those trusts that were recognised in equity by analogy with common law, as opposed

[236] ibid 388 (Lord Hardwicke LC).
[237] ibid.
[238] The process whereby uses became legal estates is explained in F W Sanders, *Essay on Uses and Trusts, and on the Nature and Operation of Conveyances at Common Law, and of Those Which Derive Their Effect from the Statute of Uses* (1st American from 4th English edn, Small, Philadelphia 1830) 86. See also W Roberts, *A Treatise on the Statute of Frauds as it Regards Declarations in Trust, Conveyances and Contracts, The Execution of Surrenders, Proof of Wills and Codicils* (Riley, New York 1807) 91-96.
[239] George Spence, *The Equitable Jurisdiction of the Court of Chancery,* Vol 1 (Lea and Blanchard, Philadelphia 1846) 512. Note that this statement was originally made in *Dyer v Dyer* (1788) 2 Cox 92, 30 ER 42, 93 (Eyre CB). The italics were added by Spence.

to trusts other than express trusts which arose according to the doctrines of equity.[240]

Consideration of the work of early commentators sheds light on the question of whether Lord Hardwicke did indeed interpret s8 as applying only to trusts recognised by analogy with common law. Of early jurists, Fonblanque, Roberts and Lewin, [241] for example, were in agreement that Lord Hardwicke interpreted s8 in this manner, although Sanders appears to have disagreed at least to some extent with Lord Hardwicke, as he included trusts such as that in *Keech v Sandford*[242] in his section on 'trusts, arising from the operation or construction of equity' which fell within the ambit of s8.[243]

The fact that numerous types of trusts of land other than those identified by Lord Hardwicke were recognised without written evidence is difficult to reconcile with his Lordship's interpretation of s8. Fonblanque therefore disagreed with Lord Hardwicke's interpretation, explaining that his 'construction of [s8] of the Statute of frauds restrains it to such trusts as arise by operation of law, except in cases of fraud, whereas it clearly extends to such as are raised by construction of equity'.[244] Roberts, on the other hand, considered that '[s]ome other words probably accompanied this observation of the Lord Chancellor'.[245]

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[240] I would like to express my gratitude to one of the anonymous reviewers of Allan, 'Ceylon Coffee' (n 1) for suggesting to me this possible interpretation of Lord Hardwicke's view of the meaning of ss7 and 8 of the Statute of Frauds.

[241] J Fonblanque and H Ballow, *A Treatise of Equity with the Addition of Marginal References and Notes*, Vol 1 (Byrne, Dublin, 1793) 121; Roberts, *A Treatise on the Statute of Frauds* (n 233) 96; T Lewin and F A Lewin, *A Practical Treatise on the Law of Trusts by (the Late) Thomas Lewin, Esq* (7th edn, Maxwell, London, 1879) 176-179.

[242] (1726) Sel Cas Ch 61.

[243] Sanders, *Essay on Uses* (n 238), n (c).

[244] Fonblanque and Ballow, *A Treatise of Equity*' (n 236) 121. See also Roberts, *A Treatise on the Statute of Frauds* (n 238) 96.

[245] Roberts, *A Treatise on the Statute of Frauds* (n 238) 96.

It is submitted, however, that the most convincing interpretation of the meaning of s8 is that of Lewin.[246] He thought that Fonblanque and Roberts had erred in assuming that the '*seventh* or enacting clause embraces all trusts indiscriminately, and that such as arise by operation of law are only saved from the act by virtue of the subsequent language contained in the eighth section.'[247] Lewin noted that s8 referred only to 'conveyances', whilst resulting trusts were routinely imposed on devises. He therefore concluded that s7 only applied to those trusts capable of being manifested and proven by writing, and that '[t]he aim of the legislature [in enacting s7] was, not to disturb such trusts as were raised by maxims of equity'.[248] The reason, according to Lewin, for the enactment of s8 was simply to confirm that resulting trusts arising by analogy with law upon apparently absolute conveyances (for example, when an apparently absolute conveyance is deemed to be subject to a resulting trust) did not need to comply with s7.

Lewin's explanation sits well with other observations by Lord Hardwicke such as, for example, his acceptance in *Young v Peachy* of a trust imposed for the prevention of fraud as an alternative to a 'trust resulting by operation of law'.[249] In *Willis v Willis,*[250] his Lordship stated that the Statute of Frauds 'requires that all declarations of trusts should be in writing, otherwise absolutely void, except such as arise by operation or construction of law', but also that '[t]here is another way of taking a case out of the statute, and that is by admitting parol evidence within the rules of this court'.[251] Lord Hardwicke's view, therefore, appears to have been that trusts arising according to the rules of equity fell outside of the ambit of s7 without needing to be saved by s8.

[246] See Lewin, *Law of Trusts* (n 241) 176-179.
[247] ibid 177-178.
[248] ibid 178.
[249] *Young v Peachy* (n 201) 256 (Lord Hardwicke LC).
[250] (1740) 2 Atk 71.
[251] ibid 71 (Lord Hardwicke LC).

This provides an explanation for the otherwise curious fact that s8 of the Statute of Frauds was cited in numerous early authorities concerning what are now regarded as resulting trusts,[252] but not in cases concerning that would now be described as constructive trusts.[253] It can therefore be seen that there was no need in the nineteenth century and earlier for the courts to classify *inter vivos* parol agreement trusts arising under the instrument of fraud principle as constructive trusts. They were recognised under an established head of equity, and no added legitimacy would have been gained by recognising them as constructive trusts of land because the latter were also understood to arise under established rules of equity, were nothing to do with s8.

3.5.1.5 Constructive trusts and the Victorian statutory limitation period

As has been demonstrated, by the time of *Rochefoucauld*, a relatively clear judicial definition of constructive trusts had emerged from the courts as a result of the need to classify trustees for the purposes of applying the limitation period. Most of the authorities are concerned with the distinction between express and constructive trusts; perhaps resulting trusts were, on the whole, so readily distinguishable from express trusts as to obviate the need for litigation.[254] The leading late nineteenth century authority on the classification of trusts for limitation purposes is *Soar v Ashwell,*[255] in which the Court of Appeal considered whether a solicitor of a trustee

[252] See, for example, *Gascoigne v Thwing* (1685) 1 Vern 366, 23 ER 526; *Kirk* (n 229); *Lloyd* (n 230); *Ryall v Ryall* (1739) 1 Atk 59, 26 ER 39; *Davies v Otty (No. 2)* (n 164).
[253] See, for example, *Pye v George* (1710) 2 Salk 680, 91 ER 578; *Marlow v Smith* (1723) 2 PW 198, 24 ER 698; *Mackreth v Symmons* (1808) 15 Ves Jun 239, 33 ER 778; and *Saunders v Dehew* (1892) 2 Vern 271, 23 ER 775. These are cases concerning purchasers with notice. See also *Keech v Sandford* (1726) Sel Cas Ch 61, 25 ER 225 and *Palmer v Young* (1864) 1 Vern 276, 23 ER 468 for examples of cases of fiduciaries renewing leases in their own name.
[254] Although not all commentators necessarily saw it this way- see P Matthews, 'The Words which are Not There: a Partial History of the Constructive Trust, in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart, Oxford, 2009); L A Sheridan, *Fraud in Equity* (Pitman, London 1957).
[255] [1893] 2 QB 390.

who retained trust property was, for the purposes of the limitation period, to be treated as an express or constructive trustee.[256] Bowen LJ explained that '[a] constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour'.[257] Similarly, Lord Esher MR stated that when a 'breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust.'[258] According to these definitions, parol trusts which were recognised to prevent the Statute of Frauds being used as an engine of fraud were clearly not constructive trusts.

3.5.1.6 How the Victorian courts dealt with trusts which were neither express nor resulting

The Court of Appeal in *Soar* recognised that the dividing line between express and constructive trusts was not always easy to ascertain. Accordingly, it was held that there was a group of trusts which were neither express trusts, nor trusts where the trustees ought to be permitted to avail themselves of the limitation period. Such trusts were sometimes described, as 'actual trusts', a definition which also included express trusts, but did not include constructive trusts. The reason why the limitation period applied to claims against constructive trustees was essentially one of policy. As Bowen LJ explained, in actions seeking, after a period of many years, to have a person declared a constructive trustee, 'conflicts of evidence are possible or probable, and to deny to the person to be charged the shelter or benefit of a period

[256] It was held that the solicitor was to be treated as an express trustee.
[257] *Soar* (n 255) 396 (Bowen LJ).
[258] ibid 393 (Lord Esher MR).

of limitation would be obviously dangerous and unjust.'[259] Where a person had knowingly taken the property as a trustee, or knowingly assumed the role of trustee, the dangers highlighted by Bowen LJ would not apply. This explains Bowen LJ's statement that ''[i]t has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property.'[260] Note here that Bowen LJ did not quite state that such trusts *are* express trusts. Rather, he qualified his classification by use of the words 'dealt with as'. Lord Esher MR, after having defined express and constructive trusts in similar terms to those used by Bowen LJ, summed up the prevailing standpoint by stating that:

> [t]here are cases not falling strictly within either of those thus enunciated, some of which have been treated by the Courts of Equity as within the class in respect of which a Statute of Limitations will not be allowed to be vouched, and some within the class in respect of which such a statute may be vouched.[261]

[259] ibid 396 (Bowen LJ).
[260] ibid 397 (Bowen LJ).
[261] ibid 393-394 (Lord Esher MR).

3.5.1.7 Summary of the relevant law as it would have been understood in 1896

To recap, when the Court of Appeal, in *Rochefoucauld*, came to consider what type of trust bound B, so as to determine the applicability of the limitation period, the state of the law was as follows:

1) there were numerous types of trusts arising according to the rules of equity that were routinely imposed on realty without any need for written evidence;
2) such trusts were recognised and enforced not because they fell within the exemption in s8, but because they were not the type of trusts which were regulated by s7;
3) some such trusts had been defined as constructive trusts for the purposes of applying the limitation period;
4) other such trusts were treated as express trusts for the purposes of the limitation period because, although they were trusts which had not been created in the usual manner in which express trusts were created, the trust property had been deposited in the defendant as a trustee;
5) there was no authority regarding whether trustees of parol trusts imposed for the prevention of fraud could avail themselves of the limitation period;
6) it had long been recognised that the prevention of fraud was sufficient reason for the court to declare that a defendant, who had knowingly obtained a conveyance of land subject to a parol trust, had taken that property in a fiduciary capacity as a trustee.

3.5.1.8 How the Court of Appeal's classification of the Trust in *Rochefoucauld* should be understood

In light of the above, it is no surprise that the Court of Appeal reached the conclusion that the trust in *Rochefoucauld* was 'an express trust within the meaning of that expression as expressed in *Soar v Ashwell.*'[262] It is submitted that, on the basis of the above reasoning, Lindley LJ and his colleagues are most unlikely to have regarded the trust as an express trust. That the trust was not a true express trust, but one arising for the prevention of fraud, was no bar whatsoever to the Court of Appeal's decision that the trust was to be *treated* as an express trust; the Court of Appeal had ruled only three years previously that certain types of trusts that were not express trusts should be treated by the courts as express trusts when adjudicating upon the applicability of the limitation period. Thus, although *Rochefoucauld* provided a new precedent on this point, the evidence indicates that this aspect of the case was not controversial or difficult.

3.5.1.9 Summary and ramifications of these findings

It is submitted that the above analysis of *Rochefoucauld* has demonstrated unequivocally that, during the nineteenth century and earlier, *inter vivos* parol agreement trusts such as *Rochefoucauld* were regarded not as express, resulting or constructive trusts, but as trusts arising out of equity's jurisdiction to prevent fraud. It should be noted that, of the 'joint purchase' cases, neither *Chattock* or *Pallant* were expressly held to be cases in which constructive trusts were enforced. Instead, the trusts in both were seemingly classed as trusts arising for the prevention of fraud. This analysis is strongly supported by the tentative conclusions to this effect which

[262] *Rochefoucauld* (n 2) 208 (Lindley LJ).

were reached in Chapter Two of this thesis in respect of parol agreement trusts falling within the first and second categories.

3.5.2 Summary regarding the proper classification of category three parol agreement trusts

It has now been established that *Rochefoucauld* and other category three parol agreement trusts were once regarded as trusts arising for the prevention of fraud, with no further classification necessary. The authorities indicate that, as in the other categories of parol agreement trusts, fraud would seem to lie in any deviation by B from the parol agreement because B had knowledge of C's reliance on the parol agreement. The ramifications of the conclusion that all types of parol agreement trusts are enforced to prevent fraud will be considered in the next chapter.

Another significant issue arising from this chapter is that, although there are many authorities in which category three parol agreement trusts were classified as trusts arising out of equity's jurisdiction to intercede in cases of fraud, in the later cases, the trusts were enforced as constructive trusts. According to modern classifications, this would seem to be entirely appropriate. The trusts clearly arise out of B's undertaking, made at a time when B had no title to declare an express trust. What is yet to be established is precisely when and why parol agreement trusts began to be classified as constructive trusts when they had previously not been so classified.

Chapter 4 The Doctrine of Parol Agreement Trusts and the Principle that Equity Will Not Allow a Statute to be used as an Instrument of Fraud[1]

4.1 Introduction

The purpose of this chapter is to draw together the findings resulting from the research and analysis contained in previous chapters, and to resolve any uncertainties or questions which remain outstanding. The extent to which a common justification based on fraud can apply to all of the kinds of trusts discussed in Chapters Two and Three will be analysed, as will the proper classification of these trusts. In light of this analysis, it will be argued that the research undertaken for the purposes of addressing the research questions of this thesis has uncovered a distinct doctrine of equity pursuant to which all of the categories of parol agreement trusts are enforced. This doctrine may conveniently be referred to as the doctrine of parol agreement trusts.

There is a clear overlap in some instances between scenarios to which the doctrine of parol agreement trusts may apply and the domain of contract law. Accordingly, this chapter will explore the juxtaposition between the doctrine uncovered here and the law of contract.

Finally, this chapter will examine the relationship between the doctrine of parol agreement trusts and the principle that equity will not allow a statute to be used as an instrument of fraud. This aim is important because the doctrine of parol agreement trusts and the instrument of fraud principle are frequently confounded so

[1] This chapter contains material published in G Allan, 'Once a Fraud, Forever a Fraud: the Time-Honoured Doctrine of Parol Agreement Trusts' (2014) 34 LS 419.

that the instrument of fraud principle is seen as the reason for the enforcement of some types of parol agreement trusts without any recognition of any separate doctrine of parol agreement trusts. The need to disentangle the instrument of fraud principle from the doctrine of parol agreement trusts is even more acute given that the instrument of fraud principle is often regarded as archaic and unconstitutional. Therefore, the extent to which the doctrine of parol agreement trusts and the instrument of fraud principle sit easily with the doctrine of parliamentary sovereignty will also be analysed critically

4.2 Reliance-based Fraud: a Common Justification for the Enforcement of Parol Agreement Trusts

4.2.1 B's knowledge of the other party's reliance binds his/her conscience

If the conclusions reached thus far are correct, in all of the categories of parol agreement trusts considered in Chapters Two and Three, equity's intervention is justified on the ground that B took the property with B's conscience affected so that for B to deal with the property otherwise than in accordance with the parol agreement would amount to a fraud. The parol agreement will normally have been expressly entered into, but in appropriate circumstances, the court may infer that the parties must tacitly have reached an agreement.[2] Whether B's conscience was so affected may be determined by ascertaining whether s/he knowingly took the property in circumstances in which the parol agreement was relied upon by the party with whom it was made (either A or C, depending on the scenario). If B has knowingly taken subject to such reliance, then any breach of the parol agreement

[2] An obvious example would be the established rule that if B remains silent upon being asked by A to perform the secret trust, B's agreement will be inferred (*Moss v Cooper* (1861) 1 J & H 352, 70 ER 782). Note also that it is widely accepted that even a declaration of an express trust may be construed or inferred from the conduct of the parties. See *Re Kayford* [1975] 1 WLR 279, Ch.

constitutes a fraud. This is so regardless of whether or not B would gain, or A or C (as the case may be) would suffer any loss or detriment, as a result of such a breach. In this respect, the position taken in this thesis differs from other 'reliance-based' explanations for equity's intervention, which tend to focus on the consequences of the reliance (i.e. on gain and loss/detriment).[3] Equity's intervention in these cases takes the form of the imposition of a trust which prevents B from perpetrating a fraud by restraining him/her from dealing with the property in any manner inconsistent with the parol agreement.

4.2.1.1 The courts' consistency revisited

In order to emphasise the consistency of the courts across the various categories of parol agreements when explaining the nature of fraud, below are some selected judicial quotes from the previous chapters or from cases cited in the previous chapters. These quotes range in date between 1741 and 2014, and have been selected from all varieties of parol agreement trusts:

> [B] had lulled [C] into not making an offer for the estate... [B] was all the time leading [C] to believe that if he bought the property [C] should have the part he wanted. Otherwise he ought to have told [C] not to rely upon him, and that if he wanted any part of the estate he must bid in competition with him… [B] was… no longer at liberty to change his mind.[4]

> The concept of fraud in equity is much wider and can extend to unconscionable or inequitable conduct in the form of a denial or refusal to

[3] See especially S Gardner, 'Reliance-based Constructive Trusts', in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart, Oxford, 2009); Y K Liew '*Rochefoucauld v Boustead* (1897)', in P Mitchell & C Mitchell (eds), *Landmark Cases in Equity* (Hart, Oxford 2012).

[4] *Chattock v Muller* (1878) LR 8 Ch D 177, 180 (Malins VC). Note that Malins VC, 181, specifically cited 'fraud' as the underlying source of equity's jurisdiction to intercede.

carry out the agreement to hold the property for the benefit of [C] which was the only basis upon which the property was transferred [to B].[5]

If a person [i.e. B] who takes a conveyance to himself, which is absolute in form, nevertheless has made a bargain that he will give a beneficial interest to [C], he will be held to be a constructive trustee for it for [C].[6]

Here is evidence, from the parties themselves, that the transaction was not what the deed purports it to be: this introduces Hunt's evidence; and he accounts for its being made an absolute conveyance, and makes it clear that [B] were intended to be trustees, and that it was a pious fraud, as it was thought better they should not appear such: and [A] may clearly come for a redemption.[7]

It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against [B] who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to [A], is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest.[8]

[T]he Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the [C] and [B] the transaction should be a mortgage transaction, it is in the eye of this Court a fraud to insist on the

[5] *AM v SS* [2014] EWHC 2887 (Fam) [25] (Coleridge J).
[6] *Neale v Willis* (1968) 19 P & CR 836, CA, 839 (Lord Denning MR). Note that Lord Diplock, 840, specifically cited 'fraud' as the underlying source of equity's jurisdiction to intercede.
[7] *Cripps v Jee* (1793) 4 Bro CC 472, 29 ER 994, 476 (Arden MR).
[8] *Bannister v Bannister* [1948] 2 All ER 133, CA, 136 (Scott LJ), cited with approval in *Staden v Jones* [2008] EWCA Civ 936, 2 FLR 1931 [30] (Arden LJ).

conveyance as being absolute, and parol evidence must be admissible to prove the fraud.[9]

[T]he fraud thus committed by [B] in inducing [A] to die intestate, upon the faith of the [B]'s representations that he would carry all such wishes as were confided to him into effect.[10]

[A], at least when his purpose is communicated to and accepted by the [B], makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise.[11]

[F]or the .... prevention of fraud, [equity] engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude, in order to prevent [B] from applying property to a purpose foreign to that for which he undertook to hold it.[12]

[T]here have been a great many cases, even since the statute of frauds, where [B] has obtained an absolute conveyance from [A and/or C], in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud; for a practice of this sort is a deceit and fraud which this court ought to relieve against.[13]

[9] *Lincoln v Wright* (1859) De G & J 16, 45 ER 6, 22 (Turner LJ).
[10] *McCormick v Grogan* (1869) LR 4 HL 82, 88 (Lord Hatherley).
[11] *Re Fleetwood* (1880) 15 Ch D 594, 607 (Hall VC).
[12] *Blackwell v Blackwell* [1929] AC 318, HL, 336 (Viscount Sumner).
[13] *Young v Peachy* (1741) 2 Atk 254, 26 ER 557, 558 (Lord Hardwicke LC).

These quotes, which are deliberately mixed in terms of chronology and categories, are representative of the vast bulk of authorities concerning parol agreement trusts. It is submitted that the consistency in reasoning amply justifies the conclusions made in this part of this thesis regarding the nature of fraud in equity as it applies to the enforcement of parol agreement trusts of all types. It should be noted that, although it has been demonstrated here that fraud in equity is far wider in its ambit than the same at common law, this does not mean that equity acts in an arbitrary fashion when invoking its general jurisdiction to prevent fraud within the context of parol agreement trusts. Rather, as the above quotes and explanations show, the meaning of 'fraud' within this context can be gleaned with a great degree of precision.

4.2.1.2 Proving reliance

Now that it has been established what is meant by 'fraud' for the purposes of the authorities covered in this thesis, is necessary to explain how, on the facts of any given case, the courts determine whether or not it is proper to intercede on the ground of fraud. To this end, it seems that the courts have developed fixed requirements for each type of parol agreement trust in order to ensure that parol agreement trusts are only enforced when the courts are satisfied that the parol agreement has been relied upon and B must have known this to be the case. Once this has been established, any deviation from the parol agreement by B would amount to a fraud, and it is competent for equity treat B as having taken as a trustee in order that s/he can be prevented from acting inconsistently with what has been agreed. Again, it should be noted that this approach is in keeping with the rule of general application that equity does not act in an arbitrary manner.[14] Here, it is

[14]See *Gee v Pritchard* (1818) 2 Swan 402, 36 ER 670.

pertinent to recall the words of Lord Hardwicke, quoted above in Chapter Two, that 'every breach of promise is not to be called a fraud'.[15]

4.2.1.1.1 Cases in which A was party to the parol agreement

In category one and two parol agreement trusts, the fact that A entered into the parol agreement with B and subsequently executed the conveyance or will in B's favour is sufficient to show reliance because, but for A's reliance on the parol agreement, the transfer in B's favour is not readily explicable. It is thus unnecessary for it to be demonstrable that any tangible level of detriment or loss would have been suffered in the event of the parol agreement not being carried out, or that B would thereby gain personally. Of course, in some of these cases, the grantor will have lost his land if the parol agreement is not adhered to, and B might gain personally if the parol agreement is not performed. It is not, however, necessary to *prove* this. This shows why the prevention of 'fraud on the testator' has long been accepted as a sufficient reason for the enforcement of secret trusts. It could be argued that, if A is dead by the time B reneges upon the parol agreement, s/he suffers no tangible loss, regardless of what subsequently happens to the property. Furthermore, as has been seen, secret trusts are readily enforceable even when B would not gain personally from failure to perform. These considerations are, however, immaterial to the question of whether B knew that A relied on the parol agreement. The fact that fraud does not arise in response to any loss suffered by A also explains why, in *inter vivos* cases such as *Staden v Jones*,[16] a resulting trust in favour of A (assuming A is still alive) would not prevent the fraud.

[15] *Whitton v Russell* (1739) 1 Atk 448, 26 ER 285, 449 (Lord Hardwicke LC).
[16] (n 8).

4.2.1.1.2 Cases in which C was party to the parol agreement

In category three parol agreement trust cases, A is not a party to the parol agreement, has not conveyed the land in reliance on the parol agreement, and usually has no awareness of it. A's reliance or lack thereof is thus immaterial to the enforcement of the trust. C, on the other hand, is a party to the parol agreement. As C has not conveyed any land in reliance on the parol agreement, his/her reliance must be proven in a different way. This is done by proving that C wished to acquire the land in question or an interest therein. In every single case of a parol agreement trust within category three, it is demonstrable that C wished to acquire the property, or at least a share therein, for himself or herself, but that, upon the parol agreement being entered into with B, s/he refrained from engaging in alternative attempts to secure this acquisition.[17] Once this can be proven, the court may safely conclude that C relied on the parol agreement and that B was aware of this. It is not necessary to consider whether C would have *actually been able to* acquire the property by different means had B indicated that s/he was not intending to honour the parol agreement, just that C relied on the parol agreement. This explains why in *Pallant v Morgan*, B's ability to bid higher than C was irrelevant, as was the fact that, in *Rochefoucauld*, C's impecuniosity was likely to have prevented her from successfully acquiring the land without B's assistance.

[17]In addition to *Rochefoucauld v Boustead* [1897] 1 Ch 196 and *Pallant v Morgan* [1953] Ch 43, CA, the other cases within this line are *Banner Homes v Luff Developments Ltd* [2000] Ch 372, CA; *Chattock* (n 4); *Cox v Jones* EWHC 1486 (Ch), [2004] 2 FLR 1010; *Holiday Inns v Broadhead* (1974) 232 EG 951, CA; *Island Holdings Ltd v Birchington Engineering Ltd* (unreported), 7 July 1981; *Lincoln* (n 9); *Samad v Thompson* [2008] EWHC 2809 (Ch), [2008] NPC 125; *Time Products Ltd v Combined English Stores Group Ltd* (unreported,) 2 December 1974; *Kearns Brothers Ltd v Hova Developments Ltd* [2012] EWHC 2968; *Du Boulay v Raggett* (1989) 58 P & CR 138, Ch.

4.2.2 Why is B's knowledge of the reliance upon the parol agreement sufficient justification for its enforcement?

The answer to the difficult question of why mere reliance on a parol agreement by A or C is sufficient to justify the imposition of a trust when B was cognisant of this reliance may be established by reassessing the reasons for equity's intervention in cases of fraud. Arguments that loss, detriment or gain are necessary ingredients of the types of trusts discussed here may respectfully be categorised as being founded on the assumption that B's culpability is dependent upon the consequences of any failure of his/hers to honour the agreement. What much of the case law seems to indicate, however, is that the aim of equity in deeming breaches of the parol agreement fraudulent was, historically, to regulate conduct. The courts apparently took the view that to breach a parol agreement that had been relied upon in the manner explored above was so intolerably unjust as to amount to fraud, even in cases in which the breach was unintentional.[18] The root of equity's disdain for such conduct seems to be that the parties had informally reached what the promisee believed to be an honest agreement and that the apparently genuine nature of this agreement had precluded the possibility of the arrangement from being drawn up in a more formal fashion, or of alternative arrangements being made.

Support for this view can be gleaned from *Lincoln v Wright*, in which Turner LJ explained that '[i]f the real agreement' was that the conveyance was not to be absolute, 'it is…a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud.'[19] Similarly, Knight Bruce LJ stated that there was 'an absence of plain dealing… that an unjustifiable attempt *to defeat*

[18]E.g. *Re Duke of Marlborough* [1894] 2 Ch 133, Ch; *Drakeford v Wilks* (1747) 3 Atk 539, 26 ER 1111; *Norris v Frazer* (1873) LR 15 Eq 318; *Cripps* (n 7).
[19]*Lincoln* (n 9) 22 (Turner LJ).

or evade a fair agreement [italics added] ha[d] been unsuccessfully made'.[20] *Lincoln* has been followed several times,[21] and numerous other cases involving *inter vivos* dispositions seem to have been decided for the same reasons.[22] The same considerations seem to apply to secret trusts cases. In *Barrow v Greenough*, for example, it was stated that, when a court is deciding whether to enforce a secret trust, '[t]he question is, whether the confidence, that the Defendant would perform the trust he undertook, did not *prevent the testator from making a new will.*[italics added]'[23] This view was endorsed in *McCormick v Grogan*, in which Lord Hatherley referred to the 'fraud thus committed by the heir in inducing the testator *to die intestate* [italics added], upon the faith of the heir's representations that he would carry all such wishes… into effect.'[24]

Although these authorities go some way towards explaining what equity finds objectionable about reneging on a parol agreement that has been relied upon, it could reasonably be argued that they do not fully explain exactly why such conduct has been deemed to amount to a fraud. In fact, there is surprisingly little exploration of this issue, even in the early cases. It seems to have long been accepted that the proposition that such conduct is fraudulent was beyond question, probably because both *inter vivos* and *post mortem* parol agreement trusts have been enforced since

[20]*Lincoln* (n 9) 21 (Knight Bruce LJ). It is notable that *Lincoln* is a case in which the land was sold by a mortgagee under a power of sale to the defendant's father. The land could have been purchased by the father with or without the parol agreement, and it was made clear that the plaintiff, being impecunious, could not have purchased the land for himself. Therefore, it is arguable that, in breaching the parol agreement, the defendant would have gained nothing that could not have been gained without the parol agreement, and also that any breach of the parol agreement would have deprived the plaintiff of nothing.
[21]Most notably in *Rochefoucauld* (n 17).
[22]For example, in *Davies v Otty (No 2)* (1865) 35 Beav 208, 55 ER 875, the trust was enforced, *inter alia*, because it was 'not honest for [B] to keep the land'
[23]*Barrow v Greenough* (1796) 3 Ves Jun 152, 30 ER 943, 154 (Arden MR). See also *Newburgh v Newburgh* (1820) 5 Madd 364, 56 ER 934, 366 (Leach VC).
[24]*McCormick* (n 10) 88 (Lord Hatherley). See also *Drakeford* (n 18) 541 (Lord Hardwicke LC).

well before the Statute of Frauds.[25]

What little discussion exists in the early case law supports this hypothesis. In *Young v Peachy,* Lord Hardwicke described the fraud of B in failing to carry out the parol agreement as '*dolus malus*'.[26] Famously, in *Earl of Chesterfield v Janssen*,[27] the same judge sought to categorise equitable fraud into five types. Whilst four of these species required a detailed justification, Lord Hardwicke merely said of the first that 'fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case'.[28] It appears that his Lordship thought cases involving *dolus malus* to be such obvious cases of fraud that no further explanation was required. Interestingly, *dolus malus* is an expression that was used in Roman law. Ill intent was originally a necessary ingredient of *dolus malus*,[29] but, by the time of Lord Hardwicke, merely taking legal title with notice of a previously existing equitable interest was considered to be *dolus malus.*[30] In *Young* itself, B's failure to perform the parol agreement was sufficient to count as *dolus malus*, without the need for the court to enquire into his state of mind. Interestingly, Lupoi has recently argued that much English trust law, including cases like secret trusts in which 'a successor who pleads the lack of formalities in order not to perform an informal confidence', derive from continental civil legal systems.[31] Furthermore, according to Lupoi, such a defence was regarded as '"*propter dolum et mendacium"* of the party

[25] See *Young v Peachy* (n 13) 275 (Lord Hardwicke LC); *Chamberlaine v Chamberlaine* (1678) 2 Freem 34, 22 ER 1041, 35 (Lord Nottingham LC).
[26](n 13) 257.
[27](1751) Ves Sen 125, 28 ER 82.
[28]ibid 55 (Lord Hardwicke LC).
[29]'Labeo defined "dolus malus" as any pretence, deceit, or means employed for the purpose of circumventing, deceiving or ensnaring another' at Dig 4, 3, 1, 2 cited in W L Burdick *The Principles of Roman Law and their Relation to Modern Law* (Clark, New Jersey, reprint, 2004) 498. See also E Descheemaeker *The Division of Wrongs, A Historical Comparative Study* (OUP, Oxford 2009) 71-72.
[30]See *Le Neve v Le Neve* (1747) 3 Atk 646, 26 ER 1172, 654-655 (Lord Hardwicke LC).
[31]M Lupoi 'Trust and Confidence' (2009) 125 LQR 253, 271

who sheltered behind the lack of legal formalities'.[32]

Overall, then, it is arguable that, according to eighteenth century equity, any failure by B to perform an agreement that, to B's knowledge, had been relied upon by A or C, was a fraud because it was *dolus malus*. Furthermore, it seems reasonable to suggest that this reasoning may have been borrowed by the early Chancellors from the civil law so that that by the 18th century, when parol agreement trusts were first considered at length in the law reports, equity's classification of such conduct as fraudulent was thoroughly entrenched.

4.3 The Classification of Parol Agreement Trusts: Analysis and Conclusions

4.3.1 Parol agreement trusts were not historically classified as constructive trusts

It appears from Chapters 2 and 3 that, historically, parol agreement trusts were not referred to as constructive trusts. Moreover, as was shown in 3.5, above, *inter vivos* parol agreement trusts did not fall within the judicial definitions of constructive trusts which were laid down for the purposes of determining the applicability of the limitation periods. Furthermore, it has been argued that, in the nineteenth century and earlier, s8 of the Statute of Frauds was only interpreted as exempting from the ambit of s7 those trusts which arose by analogy with common law resulting uses, whilst s7 simply did not apply, and was never intended to apply, to trusts arising out of equity's general jurisdiction to declare trusts in appropriate circumstances (e.g. pursuant to equity's jurisdiction to intercede in all cases of fraud). Because *inter*

[32]ibid 273. Lupoi equates the meaning of this phrase with 'fraud'. It should be noted that '*dolus malus*' was frequently abbreviated to simply '*dolus*'. See Descheemaeker, *The Division* (n 29) 71.

vivos parol agreement trusts were seen as trusts arising out of equity's general jurisdiction, there was no reason for the courts to consider trying to bring them within the ambit of s8, and certainly no reason to classify them as constructive trusts.

In *Blackwell v Blackwell,*[33] Viscount Sumner explained in similar terms, and without reference to constructive trusts, why the statutory formality requirements did not apply to secret trusts:

> the doctrine of equity, by which parol evidence is admissible to prove what is called "fraud" in connection with secret trusts, and effect is given to such trusts when established, would not seem to conflict with *any of the Acts* [italics added] under which from time to time the Legislature has regulated the right of testamentary disposition. A Court of conscience finds a man in the position of an absolute legal owner of a sum of money, which has been bequeathed to him under a valid will, and it declares that, on proof of certain facts relating to the motives and actions of the testator, it will not allow the legal owner to exercise his legal right to do what he will with his own. This seems to be a perfectly normal exercise of general equitable jurisdiction.[34]

It can thus be seen that, historically, neither *inter vivos* nor *post mortem* parol agreement trusts were seen as being subject to the statutory formality requirements in sections 5 and 7 of the Statute of Frauds or s9 of the Wills Act.

Parol agreement trusts were not the only type of trust which arose out of equity's general jurisdiction. There were many types of trusts which could be engrafted onto wills or conveyances of land without falling foul of the statutory formality requirements. The courts, not being under any pressure to justify these trusts as

[33] (n 12).
[34] ibid 334.

falling within the ambit of s8, did not become concerned with labelling any of these trusts as constructive trusts unless it became necessary to apply the limitation period. In this context some trusts arising out of equity's general jurisdiction were described as constructive trusts (for example, in respect of questions concerning the limitation period, the following have been described as constructive trustees: trustees *de son tort*;[35] 'agents [who] receive and become chargeable with some part of the trust property';[36] recipients of property who were other than equity's darling).[37] As has been seen, however, parol agreement trustees were not regarded by the courts as constructive trusts for this or any other purpose.

During the course of the nineteenth century, commentators began to take an academic interest in classifying trusts. There were numerous attempts, therefore, by nineteenth century jurists to classify further trusts arising through the application of equity's general jurisdiction, with decidedly inconsistent results. For example, Spence included as examples of constructive trusts those arising in cases such as *Keech v Sandford*[38] and purchases of land with notice, but he also included purchases 'by a man, or by his directions, and with his own money, the conveyance in fact being take in the name of another'.[39] Meanwhile, Story regarded 'implied trusts arising from the presumed intention of the parties'[40] as resulting trusts, which he viewed as distinct from 'those implied trusts (or perhaps, more properly speaking, those constructive trusts) which are independent of any such intention and are

[35] *Barnes v Addy* (1874) LR 9 Ch App 244, 251 (Lord Selborne LC).
[36] ibid 252-252.
[37] *Portlock v Gardner* (1842) 1 Hare 594, 66 ER 1168; *Soar v Ashwell* [1893] 2 QB 390, CA, 405 (Kay LJ).
[38] (1726) Sel Cas Ch 61, 25 ER 223.
[39] G Spence, *The Equitable Jurisdiction of the Court of Chancery*, Vol 1 (Lea and Blanchard, Philadelphia 1846), 510.
[40] J Story, *Commentaries on Equity Jurisprudence as Administered in England and America,* vol 2 (2nd edn, Little & Brown, Boston, 1834) 604.

forced upon the conscience of the party by the mere operation of law'.[41] Lewin followed a similar classification to that of Story.[42] Hill, on the other hand, contrary to Spence, Story and Lewin, and contrary to the authorities, classified parol trusts arising for the prevention of fraud as constructive trusts.[43] Perhaps the inconsistency is epitomised by the fact that Underhill stated in his 1894 edition that '[r]esulting trusts… are clearly constructive',[44] whereas in 1912, the same author explained that 'resulting trusts… are sometimes constructive, and sometimes express in the sense of being intentional'.[45] Perhaps this discombobulation is not surprising. As Alexander explained, the last quarter of the nineteenth century was a period in which the classification of trusts was only just beginning to be viewed seriously by commentators,[46] and considerable changes, which eventually culminated in something akin to the modern classification system, were beginning to take shape.[47] One matter upon which most commentators agreed, however, was that parol trusts enforced pursuant to the instrument of fraud principle were not constructive trusts.[48]

In summary, the analysis in this section very strongly supports the findings of Chapters Two and Three of this thesis in relation to the classification of parol

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[41] ibid.
[42] See F A Lewin, *A Practical Treatise on The Law of Trusts by (the late) Thomas Lewin, Esq*, Vol 1 (8th edn, Blackstone, Philadelphia 1888) 130 and 165.
[43] J Hill, *A Practical Treatise on the Law Relating to Trustees: Their Powers, Duties, Privileges, and Liabilities* (Stevens and Norton, London 1845) 122-123 and 141.
[44] A Underhill, *A Practical and Concise Manual of the Law Relating to Private Trusts and Trustees* (4th edn, Butterworths, London 1894) 13.
[45] A Underhill, *The Law Relating to Trusts and Trustees* (7th edn, Butterworth, London 1912).
[46] G S Alexander, 'The Transformation of Trusts as a Legal Category, 1800-1914', (1987) 5 LHR 303, 338. Alexander noted that, prior to 1875, 'legal scholars paid virtually no attention to [the] topic [of classification].' For further examples of the inconsistent labelling by nineteenth century commentators of the different categories of trusts other than express trusts, see P Matthews, 'The Words which are Not There: a Partial History of the Constructive Trust, in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart, Oxford, 2009), 13-14.
[47] As Alexander (ibid, 342-439) pointed out, the transformation culminated in Costigan's classification of trusts, according to which trusts such as that in *Rochefoucauld* fell squarely within the category of constructive trusts. Alexander was referring to G P J Costigan, 'Classification of Trusts as Express, Resulting and Constructive' (1914) 27 HLR 437, 461, n 45.
[48] Only Hill dissented on this point. See n 43 and accompanying text, above.

agreement trusts: these trusts were not, prior to the twentieth century, regarded as constructive trusts by either the judiciary or the academic community.

4.3.2 The express trust fallacy

Although parol agreement trusts were not historically thought to be constructive trusts, it is submitted that it is entirely fallacious to suggest that parol agreement trusts are express trusts. The reasons, gleaned from the analysis in the previous chapters of this thesis, may usefully be summarised as follows:

1) there is no case in which a parol agreement trust was held by a court to be an express trust (*Rochefoucauld* included, see the reasoning above, 3.5.1);
2) the requirements for parol agreement trusts are inconsistent with the requirements for express trusts because parol agreement trusts, unlike express trusts, need not satisfy all of the three certainties. There is an almost total absence of references in the case law regarding parol agreement trusts to the normal requirements for express trusts, such as the three certainties. Parol agreement trusts frequently involve a promise by B to convey the property to A or C, as opposed to a distinct promise by B to hold the property on trust for A or C.[49] It is well established that certainty of intention cannot be construed out of mere promises to convey or transfer title.[50] Furthermore, both *Russell v Jackson*[51] and *Pallant* provide examples of parol agreement trusts being recognised in circumstances in which there was insufficient certainty as to the subject matter of the parol agreement to satisfy the

[49] E.g. *Re Duke of Marlborough* (n 18); *Ali v Khan* [2002] EWCA Civ 974, [2009] WTLR 187.
[50] *Richards v Delbridge* (1874) LR 18 Eq 11; *Jones v Lock* (1865) 1 Ch App 25.
[51] (1852) 10 Hare 204, 68 ER 900.

requirement of certainty of subject matter as it applies to express trusts. The court must be able to decree a constructive trust in order to give effect to what was agreed, so the agreement must be sufficiently clear to show that B agreed to transfer property to, *or* hold for the benefit of, A or C.[52] It would thus seem that the parol agreement must identify the party who is to benefit with sufficient precision to satisfy the test for certainty of objects, although the nature of most parol agreement trusts means that the beneficiary (i.e. A or C) is usually clearly identified, so there are no authorities concerning the application of the test for certainty of objects to parol agreement trusts;

3) parol agreement trusts have variously been described by the courts on numerous occasions as trusts arising out of equity's general jurisdiction to which statutory formality requirements are irrelevant, [53] as constructive trusts,[54] as trusts implied by the courts,[55] as trusts (in the case of secret trusts) which not part of A's testamentary disposition,[56] as trusts created by the court to prevent fraud,[57] and as trusts which are not express trusts;[58]
4) parol agreement trusts are enforced when no valid declaration of express trust has been made. Examples are as follows:
    a. the 'declaration of trust' is made by B at a time at which he has no title to the property and thus no capacity to declare any trust thereof. All of the category three parol agreement trusts are examples of such trusts, for in none of these cases does B (or C, for that matter) have any title

[52] This explains decisions such as *Re Snowden* [1979] Ch 528, Ch and *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752, in which neither was established.
[53] *Blackwell* (n 12).
[54] E.g. *Bannister* (n 8); *Healey v Brown* [2002] WTLR 849, Ch; *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 FLR 1240; *Staden* (n 8); *Samad* (n 17); *AM v SS* (n 5).
[55] *Re Spencer's Will* (1887) 57 LT 519.
[56] E.g. *Briggs v Penny* (1849) 3 De G & S 525, 64 ER 590; *Re Maddock* [1902] 2 Ch 220, CA.
[57] *Stickland v Aldridge* (1804) 9 Ves Jun 517, 32 ER 703.
[58] *Re Tyler* [1967] 1 WLR 1269, Ch.

to the property in question at the time at which B undertakes to take the property as a trustee for C. Once it is understood that the trust arises out of B's undertaking, not out of any request by A as to how B is to take the property, it can be seen that all parol agreement trusts are cases which support this argument. This explains why in *Staden,* where there was a written undertaking by B to perform the trust, and *De Bruyne*[59] where the trust property was not land and an express trust could have been declared without written evidence, the trusts were expressly enforced as constructive trusts arising for the prevention of fraud rather than as express trusts;

b. the 'declaration of trust' is a mere promise to reconvey. This applies especially to category one parol agreement trusts. Here, B promises to reconvey the land to A. Even if it can be accepted that B has capacity to declare an express trust (perhaps because he repeats his undertaking upon receipt of the property), a promise to transfer property cannot amount to a self-declaration of trust, and does not satisfy the requirement for certainty of intention;[60]

5) in cases of parol agreement trusts in which the declaration of an express trust is regulated by a statutory formality requirement, it would arguably be unconstitutional for the courts to recognise an express trust in apparent denial of the statute. This aspect is explored in more detail below, at 4.6;

6) it would seem that the duties and powers of parol agreement trustees fall below those of express trustees. [61] For example, no case has been

[59] (n 54).
[60] *Richards* (n 50); *Jones v Lock* (n 50).
[61] The idea of there being a hierarchy of trusts with differing levels of duties placed on trustees has been explored by several commentators. For example, J Glister, 'Mutual Intention and Quistclose Trusts' (2012) 6 J

discovered as a result of the research conducted for this thesis in which a parol agreement trustee was held liable, for example, for breach of a duty to invest, or in which a parol agreement trustee was called upon to exercise a power of maintenance or advancement.

4.3.3 The prevention of fraud is a classification of trust in its own right: overall observations

In 3.5.1.3, above, it was argued that, at the time of the judgment in *Rochefoucauld*, *inter vivos* parol agreement trusts were not, and had never been, classed as express trusts, resulting trusts, implied trusts or constructive trusts. Instead, a trust arising out of equity's jurisdiction to prevent fraud was seen as falling within a classification of its own, quite distinct from express trusts or any other type of trust implied by equity or by analogy with the common law. Only when read in light of this understanding of the historical classification of trusts can Viscount Sumner's observations in Blackwell, which are by far the most detailed judicial utterances regarding the nature of secret trusts, be fully appreciated. In addition to the quote in 4.3.1, above, his Lordship insisted that:

> [f]or the prevention of fraud equity fastens on the conscience of the legatee a trust, a trust, that is, which otherwise would be inoperative; in other words it

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Eq 221, 225-227 explores this idea. According to Glister, a 'non-equity's darling constructive trustee' owes no duties as such, but can be forced to surrender the trust property of its traceable proceeds. Glister's next level concerns cases such as knowing recipients and some types of resulting trustees who become trustees 'when recipients take property with knowledge of another's interest'- such trustees owe a duty not to dispose of the property, and a positive duty to convey when called upon according to the rule in *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282 but no other duties. Thirdly, Glister states that some trustees, such as express trustees, who have accepted the office of trusteeship, owe a full range of duties. He also states that, sometimes, when appropriate, resulting and constructive trustees, may owe some of the duties associated with the third tier of trusteeship. It is, in fact, argued below, that parol agreement trustees and knowing recipients are probably best understood as falling within Glister's second tier, albeit owing some of the duties usually associated with trustees of the third type.

> makes him do what the will in itself has nothing to do with; it lets him take what the will gives him and then makes him apply it, as the Court of conscience directs.[62]

His Lordship went on to explain that a 'resulting trust' in favour of the testator's estate would arise 'as the result of the application of equitable doctrines to a portion of the testator's estate'.[63] As has been mentioned already in this thesis, his Lordship then went on to state that secret trusts, like resulting trusts, are the product of the court's 'exercise of a general equitable jurisdiction,'[64] and is thus not regulated by the Wills Act.

To a modern reader, it might seem as if his Lordship was skirting around the issue; today's jurist might question why Lord Sumner did not describe the secret trust as a constructive trust, which is, of course, a close cousin of the resulting trust. The answer is simple; his Lordship almost certainly did not understand the phrase 'constructive trust' as it is understood today, and did not regard secret trusts as constructive trusts. The description of secret trusts as trusts arising out of equity's jurisdiction to prevent fraud, which was part of equity's general jurisdiction to impose trusts such as secret trusts and resulting trusts according to its own principles of fraud and presumed intention, is entirely consistent with the findings of this thesis in respect of how Lindley LJ and his colleagues regarded the trust in *Rochefoucauld*. It is only as a result of the extensive analysis necessary to explain the classification of the trust in *Rochefoucauld* that the lucidity and orthodoxy of Viscount Sumner's explanation can be fully appreciated. It is therefore unsurprising that his Lordship's observations have been interpreted in such a wide variety of ways. Hence the

[62] *Blackwell* (n 12) 335 (Viscount Sumner).
[63] ibid 338.
[64] ibid 339.

conclusion that was tentatively suggested in 2.3.8.2, can, in light of the analysis of other species of parol agreement trusts, be confirmed. It is therefore submitted that, for several centuries, both *inter vivos* and *post mortem* parol agreement trusts were classified as trusts arising to prevent fraud. Historically, no parol agreement trusts were classified as express trusts, resulting trusts or constructive trusts.

4.3.4 Taylor v Davies: the point at which parol agreement trusts began to be classified as constructive trusts.

This part of the thesis deals with the seemingly mystifying question of when and why parol agreement trusts came to be regarded as constructive trusts. The point at which the definition of constructive trusts was expanded to include parol agreement trusts can be traced to the Privy Council case of *Taylor v Davies,*[65] in which, in response to a question concerning the application of the limitation period, it was recognised for the first time,[66] that there are two categories of constructive trust, one of which includes parol agreement trusts.[67] It is useful to consider the context within which this decision was reached.

Taylor is a Canadian case. The Canadian Limitation Act 1914, s47, which incorporated wording found in the Trustee Act 1888, s8, stipulated that trustees could rely on the limitation period, and defined 'trustee' as including 'a trustee whose trust arises by construction or implication of law as well as an express trustee', but

[65][1920] AC 636, PC.
[66]*Taylor v Davies* (ibid*)* has been cited as the source of the rule that there are two types of constructive trusts on several occasions in the higher courts. See, for example, *Clarkson v Davies* [1923] AC 100, PC; *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, CA; *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189.
[67]In *Taylor* (n 65) 651 (Viscount Cave), *Rochefoucauld* was expressly identified as a case concerning a constructive trust. It was held that constructive trusts such as that in *Rochefoucauld* were to be treated, like express trusts, as trusts within the statutory exemption to the limitation period.

exempted from the limitation period, *inter alia*, claims for the recovery of 'trust property, or proceeds thereof, still retained by a trustee'. The defendant, to whom a partnership firm had mortgaged its premises, was appointed an 'inspector' in relation to the firm's insolvency, pursuant to the Assignments and Preferences by Insolvent Persons Act R S Ont 1897, c 147. Whilst occupying this fiduciary office, the defendant accepted a release from the equity of redemption in satisfaction of the debt, although proper notice was not given to creditors. Several years later, having discovered that the value of the land had vastly increased, the plaintiff, who was wife of a deceased partner, sought to have the release set aside. Lord Cave stated that the defendant 'was beyond question in a fiduciary relation to the general body of creditors and was disabled (under the ordinary rules of equity) from becoming a purchaser of any part of the estate or making any other arrangement with the assignee for his own benefit, except upon the condition of making full disclosure of all material facts within his knowledge; giving full credit for the value of his bargain; and obtaining the consent of the creditors'.[68] The case was thus one of self-dealing.[69]

The defendant pleaded the limitation period as a defence. The plaintiff argued that, as a constructive trustee, the defendant was a trustee within the meaning of the Act, and thus within the statutory exemption. Accordingly, it was necessary for the Board to consider the nature of constructive trusts. The Board deemed trusts arising 'by construction of law' to be synonymous with 'constructive trusts'[70] and it was held the Canadian legislation in respect of the applicability of the limitation period to trustees

[68] ibid 647 (Viscount Cave).
[69] C.f. *Williams v Central Bank of Nigeria* [2014] UKSC 10 [23] (Lord Sumption), where it was described as a case of knowing receipt.
[70] See *Taylor* (n 65) 651 (Viscount Cave), citing *Soar v Ashwell* [1893] 2 QB 390, CA, 393 (Lord Esher MR). This is contrary to the historical construction of the term in respect of s8 of the Statute of Frauds.

had an effect identical to that of the English Trustee Act 1888, from which the provisions quoted above were taken.[71] Furthermore, it was held that this legislation had not altered the long-established law in respect of claims against trust property or property derived from the same. Lord Cave expressly mentioned *Rochefoucauld*, saying of trustees such as Boustead and those in other similar cases such as *Soar* and *Burdick v Garrick*,[72], that:

> [t[hese persons, though not originally trustees, had taken upon themselves the custody and administration of property on behalf of others; and though *sometimes referred to as constructive trustees,*[italics added] they were, in fact, actual trustees, though not so named. It followed that their possession also was treated as the possession of the persons for whom they acted, and they*, like* express trustees [italics added], were disabled from taking advantage of the time bar.[73]

It was accordingly held that the exception referred 'not to a case where a person having taken possession of property on his own behalf, is liable to be declared a

[71] Section 1(3) of the Trustee Act 1888 defined 'the expression "trustee"' as including 'a trustee whose trust arises by construction or implication of law as well as an express trustee.' The wording of the exemption was taken from s8(1) of the Trustee Act 1888 (see n 130 and accompanying text, above). The argument of the plaintiff in *Taylor*, that the defendant was a trustee within the definition in s1(3), and that therefore a claim against him for trust property was exempted from the statutory time bar, was apparently not raised in the English courts at the time in respect of constructive trustees, presumably because the law as understood in England seems to have been that the provisions of s8 did not apply at all to any claims 'to recover trust property, or the proceeds thereof, still retained by a trustee [whether express or constructive]', and that therefore the default position in respect of such claims was the old law, which, by analogy to the Statute of Limitation 1623, subjected actions against constructive trustees to the limitation period. Lord Cave approached this decidedly tricky issue in a slightly different manner, holding that, notwithstanding the statutory definition of the term "trustee", the exemption did not apply to all trustees, only to express trustees and certain types of constructive trustee.

[72] (1870) LR 5 Ch App 233.

[73] *Taylor* (n 65) 651 (Viscount Cave).

trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others.'[74] The exception therefore applied:

> not only to an express trustee named in the instrument of trust, but also to those persons who under the rules explained in Soar v Ashwell and other cases are to be treated as being in a like position; but… it does not apply to a mere constructive trustee of the character [accepted as a constructive trustee in the nineteenth century and before].[75]

The defendant, as a constructive trustee outside of the meaning of the statutory exemption, was able to rely successfully on the time bar. A constructive trustee within the meaning of the statute, such as Boustead, would not have been accorded this defence. The importance of the judgment for present purpose lies in it marking the turning point in the classification of trusts such as that in *Rochefoucauld*. It was thereafter recognised that there are two types of constructive trust, and that one of the categories included the types of trusts being considered here.[76]

4.3.5 The significance of the enactment of the Law of Property Act 1925, s53(2)

The re-classification of parol agreement trusts as constructive trusts from the early 1920s onwards acquires particular significance when it is recalled that within a few years of *Taylor*, the Law of Property Act 1925 was enacted. It is currently accepted

[74] ibid 653.
[75] ibid.
[76] The view that *Taylor* is authority for the proposition that there are two types of constructive trusts has been endorsed by the courts on several occasions. In *Clarkson* (n 66) 111-112 (Lord Scott Dickson), it was stated by the Board that '[t]he effect of the Limitations Act on a claim arising under a constructive trust was considered in the case of *Taylor v. Davies.*… and it was there laid down that there is a distinction between a trust which arises before the occurrence of the transaction impeached and cases which arise only by reason of that transaction.'

that *inter vivos* parol agreement trusts are classified as constructive trusts for the purposes of s53(2) of the 1925 Act, which expressly exempts 'constructive trusts' from the effect of s53(1)(b).[77] The predecessor of s53(2) was s8 of the Statute of Frauds. At first glance, s8 seems to have been identical in effect to s53(2). Section 8 exempted trusts that 'shall or may arise or result by the Implication or Construction of Law' from the effect of s7. As has been seen, however, the judicial consensus was that s8 only exempted only what would now be considered as resulting trusts, and did not exempt constructive trusts of any type. The repeal of s8 and its replacement with s53(2) seems to have been a watershed. Possibly as a result of Parliament having been influenced by uncertainty expressed by jurists regarding the proper meaning of s8,[78] this new provision expressly included 'constructive trusts', as distinct from resulting trusts, within its ambit, and it therefore had a meaning distinct from that of its predecessor. Here, it is useful to note that, within the context of the proper interpretation to be given to the meaning of s53(1)(c), the House of Lords held in *Grey v Inland Revenue Commissioners*[79] that the 1925 Act was more than a mere consolidating Act; rather, it was 'with a number of other Acts, the culmination of a body of legislation by which a large part of the law of real and personal estate was profoundly altered'.[80] Consequently, the courts began to hold that *inter vivos* parol agreement trusts, which had recently been reclassified as constructive trusts, were exempt from the effect of s53(1)(b) by virtue of s53(2). The contrast between pre- and post-1926 cases is stark. Of the former, there is no single unequivocal example

[77] See generally *Bannister* (n 8). Also, *Samad* (n 17) [118] (Sales J).
[78] Although the judiciary seems to have been in agreement as to the meaning of s8, there was some dispute and discussion amongst jurists. See Lewin *A Practical Treatise* (n 42) 297-300.
[79] *Grey v Inland Revenue Commissioners* [1960] AC 1, HL.
[80] ibid 13 (Viscount Simonds).

of such a trust being enforced by virtue of s8.[81] In the latter cases, the enforcement of *inter vivos* parol agreement trusts pursuant to s53(2) is commonplace.[82]

Whilst the enactment of s53(2) provided the courts with an obvious reason to hold that *inter vivos* parol agreement trusts are constructive trusts, there was no such catalyst in relation to secret trusts. The Wills Act contains no exception to s9 which is comparable to s53(2), so even after *Taylor*, there was rarely any pressing reason for the courts to actually hold secret trusts to be constructive trusts. Thus, the indistinct classification of secret trusts as trusts imposed for the prevention of fraud persisted for far longer; the first judgment in which a secret trust was upheld explicitly as a constructive trust was in 2002,[83] over fifty years after an *inter vivos* parol trust was first held to be a constructive trust.[84] This explains why Viscount Sumner's comments in *Blackwell*, which was decided only three years after the coming into force of the 1925 Act, were not influenced by the new nomenclature in s53(2).

4.3.6 An unintended effect of s53(2)

Although there are no direct authorities which suggest that the alteration in the classification of parol agreement trusts has effected any change in the underlying reason for their enforcement, an unfortunate consequence of the enactment of s53(2) has been that, at least in respect of *inter vivos* transactions, the courts began to impose constructive trusts in furtherance of parol agreements without mention of the word 'fraud'. This seems to have been based on the unconsciously adopted view

[81]See 2.2.3 for a discussion of cases that are sometimes presumed to have been enforced pursuant to s8. The most equivocal case is *Davies v Otty* (n 21), in which the trust was enforced by virtue of s8, but apparently as a resulting trust based on a lack of consideration accompanying the offending conveyance.
[82]See (n 77).
[83]*Healey* (n 54). Secret trusts had occasionally previously been referred to as constructive trusts. See *Kasperbauer v Griffith* [2000] 1 WTLR 333, CA; *Re Cleaver* [1981] 1 WLR 939, Ch.
[84]*Bannister* (n 8) seems to be the first example after the 1925 Act of a case involving an *inter vivos* parol agreement relation to land.

that s53(2) gives the courts *carte blanche* to enforce constructive trusts of land in order to give effect to parol agreements without reference to any underlying justification. This trend may provide an explanation for the decline in appreciation of the nature and significance of equitable fraud that occurred throughout the twentieth century.[85] This decline, which spread to secret trusts,[86] is arguably the ultimate source of much of the current discord in respect of trusts arising out of parol agreements.

4.3.7 Can parol agreement trusts be enforced as resulting trusts?

It will be recalled that, in part 2.4.2, the question of whether category one parol agreement trusts could be enforced as resulting trusts was considered, with the tentative conclusion that such an approach was undesirable. The findings of the chapters of this thesis which are concerned with other classes of parol agreement trusts considerably reinforce this conclusion. In the face of so many authorities that parol agreement trusts are, according to modern classifications, constructive trusts and have never been regarded as resulting trusts, it is submitted that there is no basis or justification for the enforcement of category one parol agreement trusts as resulting trusts. It was also suggested in 2.4.2 that the finding of a parol agreement ought to bind the court to displace any presumptions which could give rise to a resulting trust. This approach was recently followed in *AM v SS*.[87] Overall, it is submitted that the trusts in cases such as *Ali v Khan*[88] and *Hodgson v Marks*,[89]

[85]For example, in *Bannister* (n 8), the prevention of fraud is clearly cited as the reason for the imposition of the constructive trust. By the time of *Gissing v Gissing* [1971] AC 886, HL, the word 'fraud' seems to have fallen out of use. For example it was not used in any of the House of Lords cases of *Pettitt v Pettit* [1970] AC 777, HL, *Gissing* or *Lloyd's Bank v Rosset* [1991] AC 107 (HL).
[86]For example, the prevention of fraud was clearly held to be the reason for the enforcement of secret trusts in *Blackwell* (n 12), but by the time of *Snowden* (n 52), doubt was cast on the relevant of fraud. In *Kasperbauer* (n 83), the word 'fraud' was not used.
[87] (n 5).
[88] (n 49).

when read in the light of the authorities on other categories of parol agreement trusts, should be seen as constructive trusts.

4.4 A Newly Uncovered Equitable Doctrine: the Doctrine of Parol Agreement Trusts

At this stage, a significant conclusion can be drawn, that is that a doctrine of equity, which may conveniently be referred to as the 'doctrine of parol agreement trusts', has been uncovered. The trusts in all of the scenarios considered above are recognised pursuant to this doctrine. By virtue of the doctrine, in appropriate circumstances, a constructive trust will be raised in order to prevent a party from perpetrating a fraud by refusing to give effect to an agreement. Usually, but not necessarily, the agreement has not been reached in a form which meets with statutory formality requirements. Three conditions must be satisfied in order for the doctrine to take effect:

1) an agreement, which does not amount to a valid and enforceable contract,[90] must be reached between two parties whereby one of the parties promises that, upon receiving title to certain specified property, s/he will use it or part of it for a certain purpose;
2) the promise cannot amount to a valid declaration of express trust (in such a case, the doctrine would be redundant), so the three certainties need not

[89] *Hodgson v Marks* [1971] Ch 892, CA
[90] For further exploration of this issue, see below at 4.5.

necessarily all be satisfied, but it must be possible for the promise to be given effect by the imposition of a trust;[91]

3) the promisee must demonstrably have relied on the agreement, and the promisor must know this to be the case, so that it will be a fraud for the promisor to renege thereupon. There are several sets of fixed rules which have been formulated in order to determine whether, in any given scenario, reliance is present.[92]

4.5 Relations between the Doctrine of Parol Agreement Trusts and the Law of Contract

The first requirement of the doctrine of parol agreements trusts requires an agreement which does not amount to an enforceable contract. In light of this, the relationship between parol agreement trusts and the law of contract will be explored briefly with a view to stablishing whether the doctrine of parol agreement trusts impugns unduly on the law of contract.

Although contracts and trusts are clearly legal concepts which are distinct from one another,[93] lay-parties who wish to claim the benefit of agreements probably attach little credence to whether this is achieved through the principles of contract or trust law. Furthermore, the same set of circumstances which could potentially give rise to a contract might also give rise to a trust. As Glister and Lee put it, 'contracts and

[91]This is explained particularly clearly in *Bannister* (n 8) 136 (Scott LJ). Thus, for example, if A transfers land to B subject to an agreement that B will use it for a non-charitable purpose, then the doctrine here could not apply.
[92]See above, 4.2.1.2.
[93] See, for example Glister and J Lee, *Hanbury & Martin, Modern Equity* (20th edn, Sweet & Maxwell, London, 2015) 43.

trusts are not mutually exclusive.'[94] It is perhaps also notable that past jurists have sometimes paid little heed to the distinction between trusts and contracts. For instance, Story cited cases involving both *post mortem* and *inter vivos* parol agreement trusts as examples of cases in which 'it was held that the promise [made by B] should be specifically performed upon the ground of fraud'.[95] As specific performance is a means by which contracts are enforced, this suggests that, in parol agreement trust cases, the parol agreement is enforced because it *is* a contract. Generally, however, parol agreement trust cases were not cited in chapters on specific performance[96] in nineteenth century treatises, and are rarely cited today in commentaries on the law of contract. Interestingly, the term 'contract' was sometimes used in early secret trusts cases to refer to the parol agreement between A and B;[97] evidently, in this context, 'contract' did not carry the precise meaning of the term at common law because, in the secret trust cases, C is not a party to the 'contract'.[98] What is clear, however, is there are instances in which the doctrine of parol agreement trusts facilitates the enforcement of what would otherwise appear to be an unenforceable contract.

The cases within the *Pallant v Morgan*[99] line are cases in which the parol agreement may bear resemblance to an oral contract for the sale of land. In these cases, B promises that he will sell part of the land to C, or that he will reach an agreement to

[94] Glister and J Lee, *Hanbury & Martin, Modern Equity* (20th edn, Sweet & Maxwell, London, 2015) 43.
[95] Story, *Commentaries on Equity Jurisprudence* (n 40) 78. Cases cited include *Young v Peachy* (n 13); *Oldham v Litchford* (1705) 2 Freem 285, 23 ER 923; *Sellack v Harris* (1708) 20 Eq Ca Abr 46; *Podmore v Gunning* (1836) 8 Sim 644, 58 ER 985.
[96] See, for example, T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (3rd edn, London, Maxwell 1857); A Underhill *A Practical and Concise Manual of the law relating to trusts and trustees* (4th edn, Butterworths, London 1894).
[97] See, for example, *Stickland* (n 57) 520 (Lord Eldon LC). In *Drakeford* (n 18) 540, Lord Hardwick LC spoke of B's promise being made 'in consideration' of A's bequest.
[98] Interestingly, P Jaffey, 'Explaining the Trust' (2015) 131 LQR 377 uses the term 'contract' to refer to an agreement (by an express trustee) to perform certain obligations which is recognised by equity when there is no 'contract' according to the law of contract.
[99] (n 17).

that end with C, in consideration of C's promise not to bid against B for that land. The enforcement of such a contract according to the principles of contract law would be contrary to s2(1) of the Law of Property (Miscellaneous Provisions) Act 1989. But successful invocation of the *Pallant v Morgan* equity does not *depend* upon the finding of a valid contract, or even of an oral contract which would have been a valid contract but for s2(1). In fact, if there is a valid written contract, then the *Pallant v Morgan* equity is redundant, for C is entitled to specific performance of the contract.[100] This is apparent from several of the cases. For example, in *Pallant v Morgan* itself, it was held that the parol agreement amounted to 'an agreement that there should be an arrangement between the parties on the division of the lot if he were successful'.[101] Thus, specific performance was unavailable, and the eponymous equity was instead invoked. Similarly, *Banner Homes Group plc v Luff Developments Ltd*[102] concerned what has been described as 'a common intention to enter into a formal contract at some stage in the future'.[103] It can thus be seen that the *Pallant v Morgan* equity is a means by which equity may, through the use of constructive trusts, give effect to agreements which cannot be recognised at common law as binding contracts.

Parol agreement trusts have also been used historically to circumvent the doctrine of privity of contract. For example, in the case of an *inter vivos* category two parol agreement trust, such as *Staden*, A and B agree that A will transfer his/her interest in land to B in return for B's promise to transfer ultimately the property to C.[104] For the parol agreement trust to be enforced, there is no requirement for certainty of

[100] For an example of this, see *Chattock* (n 4).
[101] (n 17) 49 (Harman J.)
[102] (n 17).
[103] M P Thompson, 'Constructive Trusts and Non-binding Agreements', [2001] Conv 265, 273.
[104] Note that the agreement, even if in writing, may well not satisfy the Law of Property Miscellaneous Provisions Act 1989, s2. Of course, according to s2(5), s2 does not affect 'the creation or operation of resulting, implied or constructive trusts.'

intention,[105] and it may well not have been within the contemplation of the parties to create a trust (it is worth reiterating here that a promise to transfer property does not satisfy the requirement of certainty of intention). Rather, they are likely to have simply entered into an agreement which they believed to be enforceable. If the court, by means of a constructive trust, allows C to enforce the agreement, is this not a naked circumvention of the requirement for privity of contract?[106] Similar considerations can apply to secret trusts. Indeed, in *Drakeford v Wilks*,[107] Lord Hardwicke couched his explanation of a secret trust in terms which would resonate with contract lawyers: 'if [A] has a conversation with [B], and [B] promises that, *in consideration of* [italics added] the disposition in favour of her, she will do an act in favour of a third person…'

This point was not lost on early commentators. For instance, Spence explained the juxtaposition between category two parol agreement trusts and the common law rules relating to contract law as follows:

> It seems that a promise made *to* a person, *not a party* to the consideration, but for whose benefit the stipulation is made, as well as to the party from whom the consideration proceeds, such third person may enforce it.[108]

For this rule to apply, explained Spence, 'the promise must be laid, in an action, as made to the third person.'[109] But, significantly for present purposes, Spence further explained that '[i]t may be observed that a promise made to a testator alone, on the faith of which he omits to make a devise, will be enforced in equity, notwithstanding

[105] See above, at 4.3.2.
[106] NB: the doctrine of privity of contract has been diluted by the Contracts (Rights of Third Parties) Act 1999.
[107](n 18).
[108] G Spence, *The Equitable Jurisdiction of the Court of Chancery*, Vol 2. (Stevens & Norton, London, 1849) 279.
[109] ibid, n (*c*). It is sometimes stated that the earliest case concerning a secret trust is *Rookwood's Case* (1588) Cr Eliz 164. As Spence points out, however, *Rookwood* is simply an authority on the validity of consideration.

the Statute of Frauds.'[110] Several cases concerning parol agreement trusts were cited in support of this assertion,[111] and Spence went as far as to suggest that:

> the cases cited… as to not permitting a person to take fraudulent advantage of an act of Parliament made to supress fraud, which seem to be to some extent applicable to prevent an improper advantage being attempted to be taken of a rule of law.[112]

All of this was, according to Spence, notwithstanding the general rule of equity that 'none can come here for a specific performance who does not come under the consideration of the contract.'[113]

Spence's analysis is valuable for the purposes of this thesis because it shows that equity has long possessed jurisdiction to recognise and enforce, for the prevention of fraud, trusts arising in situations in which, according to the rules of contract law at common law and in equity, the plaintiff would be denied relief for want of privity of contract. As has been demonstrated throughout this thesis, however, the circumstances in which parol agreement trusts may arise have been carefully laid down. It would therefore not be reasonable to suggest that the doctrine of parol agreement trusts impugns unduly upon the doctrine of privity of contract.

It is also relevant to note that, within the specific context of third party rights in contract law, it has been recognised in several cases that the right to sue upon a contract is property which is capable of being subject to a trust. It is therefore possible to circumvent the doctrine of privity of contract through an arrangement whereby 'a promisee may agree to hold his contractual right to sue a promisor on

[110] ibid.
[111] E.g. *Reech v Kennegal* (1748) 1 Ves Sen 123, 27 ER 932; *Sellack* (n 95); *Podmore* (n 95).
[112] Spence, *The Equitable Jurisdiction*, vol 2 (n 108) 279, n. (*c*).
[113] ibid 280.

trust for the third party and, as a beneficiary under a trust, the third party acquires a property right which he can assert against someone, such as the promisor, who interferes with it.'[114] One difference between these cases and the cases on parol agreement trusts is that it is necessary to convince the courts that the parties *intended to create a trust of the right to sue* rather than merely enter into a contract,[115] whilst, in order to invoke the doctrine of parol agreement trusts, it is merely necessary to show that A and B agreed that B would transfer the property in question to C. It might therefore be suspected that the doctrine of parol agreement trusts has more potential to undermine the doctrine of privity of contract. The answer to such a charge would be that cases like *Staden* are rare, for equity has exercised sparingly its jurisdiction to provide relief to third parties to *inter vivos* parol agreements through the imposition of trusts, and the requirements for secret trusts, which are stringent, have been very carefully stipulated. The probable reason for the scarcity of cases is that equity's jurisdiction in relation to parol agreement trusts is based on the prevention of fraud and, as has been seen, not every breach of a promise or agreement amounts to fraud in equity. Furthermore, it might be noted that the doctrine of privity of contract has been eroded considerably by the Contracts (Rights of Third Parties) Act 1999, to the extent to which some *inter vivos* category two parol agreement trusts might also be enforceable as contracts.

Insofar as the doctrine of parol agreement trusts may serve to provide claimants with an avenue for relief in cases in which the parol agreement could potentially be viewed as an attempted contract which would not be enforceable according to the

[114] E McKendrick, *Contract Law; Text, Cases and Materials*, (6th edn, OUP, Oxford, 2014), 975. As McKendrick points out, relevant authorities include *Dunlop Pneumatic Tyre Company v Selfridge and Company Ltd* [1915] AC 847, HL; *Re Schebsman* [1944] Ch 83, CA; *Vandepitte v Perferred Accident Corp. of New York* [1933] AC 70, PC; *Les Affreteurs Reunis v Walford* [1919] AC 801, HL.
[115] *Schebsman*, ibid.

rules of contract law, it should, it is suggested, be viewed in the same light as the doctrine of promissory estoppel. This is another doctrine of equity which provides claimants with an avenue for relief in instances in which the usual rules of common law (relation to consideration) have not been satisfied, but only in certain specific circumstances which have been carefully laid down by the courts.[116]

In summary, the doctrine of parol agreement trusts is a doctrine by which the rules of equity facilitate the enforcement of bargains or agreements which would not amount to enforceable contracts at law and which might well not have been contemplated by the parties to be enforced as trusts. As such, the doctrine does, to some degree, encroach upon the law of contract. It is, however, by no means the only doctrine of equity to do so, and the extent of the encroachment is relatively minor. Furthermore, the strict requirements for the successful invocation of the doctrine of parol agreement trusts means that there is little potential for the expansion of the doctrine of parol agreement trusts so as to further interfere with contract law.

4.6 The Doctrine of Parol Agreement Trusts: the Relationship with the Instrument of Fraud Principle and the Doctrine of Parliamentary Sovereignty

4.6.1 Introduction

Although this thesis has demonstrated that the underlying reason for the enforcement of parol agreement trusts is the prevention of fraud, the relationship of the doctrine with the instrument of fraud principle has yet to be explored. This exploration is significant for two reasons in particular. Firstly, the constitutionality of

[116]On promissory estoppel, see *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 (KB).

the instrument of fraud principle, and by association the enforcement of some types of parol agreement trusts, has repeatedly been called into question by modern commentators. For example, Low comments, within the context of a discussion of parliamentary sovereignty, that 'a campaign of subterfuge appears to have been waged in relation to the so-called doctrine of *Rochefoucauld v Boustead'.*[117] Secondly, the relevance of the instrument of fraud principle to the modern law may be questioned, particularly in respect of inter vivos parol agreement trusts, to which s53(2) now applies.

4.6.2 The historical judicial interpretation of the scope of statutory formality requirements

4.6.2.1 The instrument of fraud principle is one of statutory interpretation

It seems that in the nineteenth century and earlier, the principle that equity will not permit a statute to be used as an instrument of fraud was essentially a matter of statutory interpretation. Secret trusts cases in particular have led to many judicial observations about the relevance of statutory formality requirements to the court's jurisdiction to prevent fraud. In *Reech v Kennegal,*[118] Lord Hardwicke explained that 'the statute should never be understood to protect fraud; and therefore whenever a case is infected with fraud... the court will not suffer the statute to protect it'.[119] Furthermore, in *Walker v Walker*[120] the same Lord Chancellor explained, of the admission of parol evidence in cases of fraud, that '[t]he allowing any other construction upon the statute of Frauds and Perjuries, would be to make it a guard

[117] K F K Low 'Nonfeasance in Equity' (2012) 128 LQR 63, n 122. See also p78. See also, see E Challinor 'Debunking the Myth of Secret Trusts?' [2005] Conv 492, 297; P Critchley, 'Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts' (1999) 115 LQR 631, 653-654; Gardner, 'Reliance-based Constructive Trusts' (n 3) 64 and 68.
[118](n 111).
[119]ibid 125.
[120] (1740) 2 Atk 98, 26 ER 461.

and protection to fraud, instead of a security against it, as was the design and intention of it.'[121] For this reason, a 'defence arising from the fraud and imposition of the plaintiff, and has nothing in the world to do with the statute of Frauds and Perjuries.'[122]

Similarly, in *Podmore v Gunning,*[123] Shadwell VC stated that 'the very worst method of construing the Statute of Frauds would be that which would give rise to frauds instead of preventing them'.[124] In *Jones v Badley,*[125] much the same reasoning was applied by Lord Cairns, as he made clear that when discussing the relationship between secret trusts and:

> the Statute of Frauds, or, rather, the Statute of Wills, by which the Statute of Frauds is now in this respect superseded', [the court] 'does not violate the spirit of the statutes; but *for the same end* [italics added], namely prevention of fraud, it engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude'[126].

Perhaps, then, the principle is better understood as that equity will not allow a statute *intended to prevent fraud* to be used as an instrument of fraud.[127] Secret trusts cases involving the Mortmain Act 1736[128] are instructive because, in such cases, testators generally attempted to hide behind the formality requirements of the Statute of Frauds as a means of facilitating dispositions that would otherwise have been rendered illegal by the Mortmain Act. This prompted much judicial agonising about

[121] ibid 100 (Lord Hardwicke LC).
[122] ibid 9.
[123](n 95).
[124]ibid 65.
[125](1868) LR 3 Ch App 362
[126] ibid 364 (Lord Cairns LC), citing *Wallgrave v Tebbs* (1855) 2 Kay & J 313, 69 ER 800, 322 (Page Wood VC).
[127] This point is made by S Wilson, *Todd and Wilson's Textbook on Trusts*, (9th edn, OUP, Oxford 2009) 13, but is not widely accepted.
[128]See above, 2.3.4.3.1

the intentions of Parliament, as is exemplified by Lord Eldon's approach in *Stickland v Aldridge*:[129]

> It would be a strong proposition, that the providence of the Legislature, having attempted expressly to prevent a disposition of land for purposes of this sort, was so short as to be baffled by such a transaction as is stated by this Bill... It would be singular, if the Court would protect individuals, and would not act, to prevent a fraud upon the Law itself.[130]

This again demonstrates that the intention of Parliament was paramount in the minds of the judges when relationship of parol agreement trusts with statutory formality requirements was under consideration.[131] Similar reasoning was employed in *inter vivos* cases, which also show that the courts were keen that statutes passed to prevent fraud could not be employed for the opposite purpose. For instance, in *Haigh v Kaye*,[132] James LJ stated that 'it is clear that the Statute of Frauds was never intended to prevent the Court of Equity from giving relief in a case of a plain, clear, and deliberate fraud.'[133] Malins VC was even more expansive in *Booth v Turle*,[134] stating that:

> it is clear that the conduct of the Defendant in attempting to avail himself of the legal assignment of the whole is fraudulent, and that he cannot protect himself by the Statute of Frauds in the commission of such a fraud. That

[129](n 57).
[130]ibid 519.
[131]See also *Boson v Statham* (1760) 1 Cox 16, 29 ER 1041, 18-20; *Wallgrave* (n 126) 321-328; *Adlington v Cann* (1744) 3 Atk 141, 26 ER 885.
[132] (1872) LR 7 Ch 469
[133]ibid 474 (Malins VC). See also *Lincoln* (n 9) 22 (Turner LJ); *Rochefocuauld* (n 17) 206 (Lindley LJ).
[134] (1873) LR 16 Eq 182.

> statute was passed, as has been often said, to prevent, and not to protect or cover fraud.[135]

This latter quote especially explains why the statutory formality requirements do not interfere with equity's jurisdiction to prevent fraud.

4.6.2.2 The statutory formality requirements do not interfere with equity's jurisdiction to intervene in cases of fraud

The sophistication of the instrument of fraud principle was explored by Viscount Sumner in *Blackwell*. His Lordship demonstrated that the instrument of fraud principle amounts to far more than flat refusal by the courts to apply statutory provisions. He said, in relation to secret trusts:

> when, on the strength of these or similar general statements of the doctrine, it has been said that in this connection equity has "given the go-by" to the Wills Act, less than justice has been done to equity and these great masters of it. When Lord Cairns speaks of equity not letting the devisee set up the statute it would seem that a fortiori equity would not set up the statute for itself to prevent the devisee from doing what it would have itself compelled him to do, if he had been negligent or dishonest in his trust, and when he speaks, in a figure, of "engrafting" the trusts on the devise surely he is saying in condensed words, that evidence, which could not be admitted to fill in what the testator's will leaves out, may yet be admissible to inform the Court what duty, onerous or not, it must bind on the conscience of the devisee, taking him

[135] ibid 187 (Malins VC).

> as being with regard to legal title such a devisee as the will has made him according to its terms.[136]

As has been seen, his Lordship further explained that secret trusts are imposed 'for the prevention of fraud'[137], and 'the legislation did not purport to interfere with this general equitable jurisdiction'.[138] Viscount Sumner's reasoning is equally applicable to *inter vivos* parol agreement trusts, where evidence which is not admissible to 'fill in' what was omitted from the deed of conveyance can similarly be applied, for the prevention of fraud, 'to inform the Court what duty… must bind' B. Notably, in the context of *inter vivos* agreements, Lord Thurlow spoke in *Irnham v Child*[139] of 'the general authority of a court of equity, to relieve in cases of fraud'.[140] Here, it is pertinent to recall that it has been demonstrated, above at 3.5.1.4, that, according to the influential and authoritative jurist Lewin, s7 of the Statute of Frauds was never intended by Parliament to apply to trusts arising out of equity's general jurisdiction, only to express trusts.

A further argument in favour of the view that it has never been within the intention of Parliament for parol agreement trusts to be regulated by the formality requirements for testamentary dispositions and declarations of trusts of land can be made on the basis that Parliament has had several opportunities since 1677 to amend the statutory provisions in question, and has consistently declined to do so. This has not been lost on the courts. In *Blackwell*, Viscount Sumner, pointing out that secret trusts have been enforced for several centuries, commented that the Wills Act:

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[136] *Blackwell* (n 12) 337 (Viscount Sumner).
[137] ibid 335.
[138] ibid 339.
[139] (1781) 1 Bro CC 92, 26 ER 1006.
[140] ibid 93 (Lord Thurlow).

> is an amending Act, of which it may be said in no merely theoretical sense that the Legislature was acquainted with the existing state of the law… for two Royal Commissions… after enquiring (*inter alia*) into the subject of wills of real and personal property had reported before the Wills Act came before Parliament as a Bill. The extent to which parol evidence was admissible under existing practice for various purposes and the evils thereout arising were known… [and] no… remedy is attempted by the Statute of Wills for the mischiefs that might arise from admitting evidence [in secret trusts cases].[141]

The exact same argument can be made in respect of *inter vivos* parol agreement trusts, but even more strongly. As has been explained above at 4.3.5, by the time that the Law of Property Act 1925 was enacted, it had come to be accepted by the English courts that *inter vivos* parol agreement trusts are constructive trusts. The wording of s53(2) of that Act expressly clarified that constructive trusts fall within that subsection. Hence, Parliament went further than merely continuing not to interfere with equity's jurisdiction to recognise parol agreement trusts. Rather, the legislature expressly legislated so as to exclude *inter vivos* parol agreement trusts from the ambit of the formality requirements in s53(1)(b).

A final point to note is that it has been mentioned several times above in this thesis that there are a number of authorities which show that both *inter vivos* and *post mortem* parol agreement trusts have been enforced since before the enactment of the Statute of Frauds.[142] In *Chamberlaine v Chamberlaine*,[143] Lord Nottingham said that it had been 'the constant course of this court'[144] to enforce secret trusts. His

[141] *Blackwell* (n 12) 338.
[142] See *Young v Peachy* (n 13) 257 (Lord Hardwicke LC).
[143] (n 25).
[144] ibid 35.

Lordship is also said to have regarded the doctrine by which secret trusts are enforced 'as established',[145] This is of particular significance in light of the fact that Lord Nottingham was the chief draughtsman of the Statute of Frauds,[146] for it provides strong evidence that that legislature has never intended to interfere with equity's jurisdiction to raise trusts to prevent fraud in cases concerning parol agreement trusts.

4.6.3 The doctrine of parol agreement trusts, the instrument of fraud principle, and the doctrine of parliamentary sovereignty: the verdict

It the response of the courts to the introduction of the statutory formality requirements was that Parliament did not intend that the Statute of Frauds or its successor provisions, enacted to prevent fraud, should be used to facilitate fraud, and that therefore Parliament must not have intended to interfere with equity's jurisdiction to impose trusts for the prevention of fraud. Equity judges from previous centuries were, it seems, well aware of their duty to follow the will of Parliament, as is evident from numerous *dicta* from cases concerning parol agreement trusts. If this view is accepted, to state that the doctrine of secret trusts is unconstitutional is, in fact, to disregard not only the weight of authorities, but also the will of Parliament. It is evident from many authorities that the judiciary has taken the view that to fail to enforce parol agreement trusts and thus permit s9 to be used as an instrument of fraud would be subversive to the doctrine of parliamentary sovereignty. As Cotton LJ

[145] *Walpole v Orford* (1797) 3 Ves Jun 402, 410**.** The Solicitor general made this comment in relation to an apparently unreported secret trust case from the time of Lord Nottingham called *Berenger v Berenger*.
[146] Lord Nottingham's role as a draughtsman is explained in W S Holdsworth, *History of English Law*, Vol 6 (Merthuen, London 1925) 384.

put it in a secret trust case, when there is a correctly communicated and accepted secret trust, 'the court is justified *and bound* to admit parol evidence'.[147]

If the conclusions reached so far are accepted, what is now called a constructive trust, in the context of parol agreement trusts, may be thought of as a manifestation of equity's ancient jurisdiction to prevent fraud. The instrument of fraud principle is not a separate doctrine; it merely explains why no statutory provisions regulate the exercise of this jurisdiction. Accordingly, parol agreement trusts can be enforced for the prevention of fraud regardless of whether or not the disposition in question is one which, prima facie, seems to be regulated by formality requirements.[148] Although, in the case of *inter vivos* parol agreement trusts of land, equity's ability to intervene to prevent fraud has been formalised by s53(2) of the 1925 Act, perhaps this should not be seen as a reason to dismiss the instrument of fraud principle. Rather, it is proposed that the enactment of s53(2) ought to be seen as vindication of equity's approach as explained here. As for secret trusts, the reasoning of Viscount Sumner still has direct application today.

In conclusion to this section, it is proposed that the juxtaposition between the instrument of fraud principle, fraud as a justification for the doctrine of parol agreement trusts, and the doctrine of parliamentary sovereignty may be summarised as follows:

1) B acquires legal title to the property in circumstances where there has been no express trust created in accordance with the relevant formality requirements;

[147] *Re Spencer's Will* (1887) 57 LT 519, 521.
[148] This view explains why parol agreement trusts may be enforced for the prevention of fraud in instances where statutory formality requirements do not apply. See, for example, *Banner Homes* (n 17); *De Bruyne* (n 54).

2) Nevertheless, A or C (as the case may be) claims that B has taken as trustee for him/her;
3) Prior to acquisition of legal title to the property, B had agreed with A or C to use the property in a certain way, and A or C had, with B's knowledge, relied on this agreement;
4) It has, since prior to the Statute of Frauds, been regarded by equity as a fraud for B to renege on such a parol agreement;
5) Equity has a general jurisdiction to impose a trust (now recognised as a species of constructive trust) for the prevention of fraud;
6) It was not within Parliament's intention that the statutory formality requirements should be used as an engine of fraud;
7) Consequently, Parliament did not seek to interfere with equity's general jurisdiction to impose a trust for the prevention of fraud;
8) Therefore, even though no trust has been declared or evidenced as required by the statutes, equity may nevertheless hold that B took as a trustee for A or C.

Chapter 5 The Place of Parol Agreement Trusts within the Law of Constructive Trusts

5.1 Introduction

The purpose of this chapter is to give doctrinal consideration to the position of parol agreement trusts within the law of constructive trusts. The first aim is to consider the relationship between parol agreement trusts and the other types of trusts and equitable doctrines which are similar to, or have sometimes been assimilated with, parol agreement trusts. The extent to which parol agreement trusts differ from, and are similar to, 'common intention constructive trusts', 'subject to contract' constructive trusts, proprietary estoppel, and mutual wills will be explored with a view to establishing whether any of these trusts or doctrines should be subsumed within the doctrine of parol agreement trusts.

The second aim of this chapter is to consider the relationship, in terms of doctrinal affinities, between parol agreement trusts and other constructive trusts. Although a full survey of the law of constructive trusts is beyond the scope of the research question, the research which has been undertaken for the purposes of this thesis has shed some light on the historical doctrinal relationship between parol agreement trusts and other trusts, which may in turn inform thinking in respect of some of today's controversies in the law of constructive trusts.

5.2 Are 'Common Intention Constructive Trusts' Parol Agreement Trusts?

Even within an area of law so beset by controversy as that of constructive trusts, those trusts often referred to as 'common intention constructive trusts' stand out as a

lightning rod for debate.[1] This section explores whether common intention constructive trusts are best regarded as falling within the doctrine of parol agreement trusts and whether such a finding would provide a doctrinal basis for the resolution of the many contradictions and uncertainties which blight this area of equity. These cases typically involve a dispute between unmarried partners in circumstances where a shared home was purchased from A in the name of one of the partners (B) subject to a parol agreement that the other (C) should have a beneficial interest in the property.[2] The parol agreement may have been expressly entered into by the parties, or it may be inferred from their conduct. Either way, the express or inferred parol agreement may lead to the imposition of a constructive trust. It is thus evident that, at least superficially, parol agreement trusts and common intention constructive trusts are extremely similar. Once it has been established that a beneficial interest in C's favour has arisen under a common intention constructive trust, it is necessary for the court to quantify that interest. According to recent developments in the law, common intention constructive trusts may also arise when legal title to the land is acquired in the joint names of B and C. In these 'co-ownership' cases, there is

[1] See, for example, A Hayward, 'Common Intention Constructive Trusts and the Role of Imputation in Theory and Practice' [2016] Conv 233; S Greer and M Pawlowski, 'Imputation, Fairness and the Family Home [2015] Conv 512; B Sloan, 'Keeping up with the *Jones* Case: Establishing Constructive Trusts in 'Sole Legal Owner' Scenarios' (2015) 35 LS 226; Y K Lieu, 'The Secondary-rights Approach to the "Common Intention Constructive Trust"' [2015] Conv 210; T Etherton, 'Constructive Trusts: a New Model for Equity and Unjust Enrichment' (2008) 67 CLJ 265; S Gardner and K Davidson, 'The Supreme Court on Family Homes' (2012) 128 LQR 178; S Gardner, 'Family Property Today' (2008) 124 LQR 422.

[2] In *M v M* [2013] EWHC 2534, [2014] 1 FLR 439 it was held that a common intention constructive trust could arise, within the context of a 'one man company', between a company and its controller. Furthermore, in *Crossco No 4. v Jolan Ltd* [2011] EWCA Civ 1619, [2012] All ER 754, it was recognised by the Court of Appeal that the principles relating to common intention constructive trusts may be employed outside of the context of the family home. It should, however, be noted that in *Erlam v Rahman* [2016] EWHC 111 (Ch), [2016] P & CR DG5 [41], it was held that when contributions have been made to the acquisition of property outside of a domestic setting, the principles of resulting trusts should prevail, and common intention constructive trusts should have no application.

already a trust of land.[3] In such cases, the common intention constructive trust is used for the purposes of quantifying the beneficial interests.

This part of the thesis will consider firstly whether the 'single ownership' cases of common intention constructive trusts should be regarded as parol agreement trusts. Next, the question of whether the doctrine of parol agreement trusts may justify the use of constructive trusts in the 'co-ownership' cases will be considered. Finally, there will be a brief analysis of the extent to which the doctrine of parol agreement trusts may bring about some clarity to the means by which the beneficial interests are quantified in cases concerning intention constructive trusts.

5.2.1 Single ownership cases: the establishment of the constructive trust

5.2.1.1 Background: the nature and requirements of common intention constructive trusts

For a variety of socio-legal reasons, the first of the cases concerning common intention constructive trusts did not appear until the latter part of the twentieth century. [4] Although the case which gave birth to common intention constructive trusts is *Gissing v Gissing*,[5] the leading case on the requirements for common intention constructive trusts in cases of single ownership is *Lloyd's Bank v Rosset*.[6] In this case, the House of Lords held that the necessary requirements for the establishment of a common intention constructive trust are an express or inferred agreement, or a common intention, between B and C that C has a beneficial interest in the land, and

[3]Law of Property Act 1925, ss34-26.
[4]For a comprehensive explanation, see *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 [41]-[48] (Baroness Hale) and *Pettitt v Pettit* [1970] AC 777, HL, 824 (Lord Diplock). Note that the courts now have statutory powers to redistribute the property of divorcing spouses and civil partners under the Matrimonial Causes Act 1972 and the Civil Partnership Act 2004 respectively. Nevertheless, there are still very large numbers of cohabiting couples with no such statutory protection (see *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 [56] (Lord Collins)).
[5] [1971] AC 886, HL.
[6] [1991] AC 107, HL.

detrimental reliance on the agreement by C. An express common intention can arise as a result of any conversation between B and C which might be interpreted as an agreement that C should take a beneficial interest, including excuses as to why legal title is in B's sole name.[7] In *Rosset*, Lord Bridge emphasised that a common intention will only be inferred when C has made a direct contribution to the purchase price of the land.[8] According to the law as laid down in *Rosset*, once a common intention has been established, indirect contributions can be sufficient to show detrimental reliance.[9] In cases of inferred common intention, the direct contribution itself is sufficient to satisfy the requirement of detrimental reliance.[10]

Recent *obiter* statements in two co-ownership cases, *Stack v Dowden*[11] and *Jones v Kernott*,[12] have thrown some doubt on whether the requirements in *Rosset* are still good law. Most specifically, doubt has been cast on whether it is still necessary to prove detrimental reliance in order to establish a common intention constructive trust and also whether indirect contributions might be sufficient to establish an inferred common intention. Opinion amongst commentators is split as to the current state of the law,[13] although it has been held in several recent authorities that detrimental

[7] *Grant v Edwards* [1986] Ch 636, CA; *Eves v Eves* [1975] 1 WLR 133, CA; *Hammond v Mitchell* [1991] 1 WLR 1127, Fam.
[8] [1991] AC 107, 132-133.
[9] See *Grant* (n 7); *Eves* (n 7); *Hammond* (n 7).
[10] *Midland Bank v Cooke* [1995] 4 All ER 562, CA.
[11] (n 4).
[12] (n 4).
[13] The following take the view that detrimental reliance is still a requirement: A Hudson, *Equity & Trusts* (7th edn, Routledge, Abingdon, 2013) 721-723; J Glister and J Lee, *Hanbury & Martin*: *Modern Equity* (20th edn, Sweet & Maxwell, London 2015), 300; B McFarlane & C Mitchell, *Hayton & Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies*, (14th edn, Sweet & Maxwell, London, 2015), 689-690; B McFarlane, N Hopkins & S Nield, *Land Law: Text, Cases and* Materials (3rd edn, OUP, Oxford, 2015), 542. On the other hand, P Davies & G Virgo, *Equity & Trusts, Text, Cases and Materials* (OUP, Oxford, 2013), 427-438 take the view that detrimental reliance is no longer a requirement, whilst P Pettit, *Equity & the Law of Trusts* (12th edn, OUP, Oxford, 2012), 200, takes the view that the law is unclear in this respect. Meanwhile, McFarlane, Hopkins and Nield, 552, suggest that in order for a common intention to be inferred, a direct contribution is still necessary, whilst McFarlane and Mitchell, 688-689, suggest that a direct contribution is not necessary. Glister and Lee, 304-305, take the view that it is unclear whether a direct contribution is still required.

reliance is still a requirement for common intention constructive trusts in single ownership cases.[14]

5.2.1.2 Are single ownership common intention constructive trusts examples of parol agreement trusts?

Although the cases concerning common intention constructive trusts are numerous, there is surprisingly little in the way of judicial discussions as to the jurisprudential origins of these trusts, especially in the leading cases.[15] In *Re Densham,* however, Goff J opined that the principle upon which common intention constructive trusts operates, by which 'it would be unconscionable for a party to set up the statute and repudiate the agreement… was established long ago in *Rochefoucauld v Boustead...* and clearly accepted by the House of Lords in *Gissing v Gissing'.*[16] In *Gissing* itself, no reference was made to *Rochefoucauld v Boustead*[17] or any of the other cases referred to above. It is submitted, however, that if the judgment as a whole is scrutinised, the reader does not come away with the impression that their Lordships viewed themselves as inventing a new ground for the imposition of a constructive trust. Therefore, Goff J's view that the House of Lords was merely applying the principle in *Rochefoucauld* is, at the very least, plausible. Accordingly, in order to determine whether it is competent to regard common intention constructive trusts as parol agreement trusts, the extent to which common intention trusts satisfy the requirements for parol agreement trusts, as laid down above at 4.4.

[14] *Curran v Collins* [2015] EWCA Civ 404, [2016] 1 FLR 505 [2] (Arden LJ); *Gallarotti v Sebastianelli* [2012] EWCA Civ 865, [2012] 2 FLR 1231 [5] (Arden LJ), although c.f. *Capehorn v Harris* [2015] EWCA Civ 955, [2016] HLR 1.
[15] *Gissing* (n 5); *Rosset* (n 6); *Stack* (n 4); *Jones v Kernott* (n 4).
[16] *Re Densham* [1975] 1 WLR 1518, Ch, 32 (Goff J). See also *Healey v Brown* [2002] WTLR 849, Ch.
[17] [1897] 1 Ch 196, CA.

5.2.1.2.1 Requirement one: an agreement must be reached between two parties whereby one of the parties promises that, upon receiving title to certain specified property, s/he will use it for a certain purpose

It has been pointed out several times that in most cases of common intention trusts, B palpably never had any intention that C should take an interest in the land.[18] Use of the phrase 'common intention' in this context seems to have originated from judicial attempts in the 1950s to invent a new type of interest called a 'family asset', arising out of a spousal common intention,[19] the phrase 'common intention' being borrowed from contract law.[20] Although the myth of the family asset was put to rest in *Gissing,* use of the phrase 'common intention' persisted. 'Intention' seems to have been given the objective meaning familiar to modern contract lawyers, i.e., whether 'what was communicated between [the parties] by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed…'[21] Thus, the enforcement of common intention constructive trusts turns upon the finding of an agreement between the parties. In *Gissing v Gissing,* Lord Diplock explained that such trusts arise out of an 'oral agreement between [B] and [C],'[22] In *Rosset,* Lord Bridge emphasised that 'common intention' has the same meaning as 'an agreement, made an arrangement… an understanding'.[23] The need for an agreement has been reiterated many times since.[24] The agreement may be

[18]See N Piska 'Constructive Trusts and Constructing Intention' in M Dixon (ed) *Modern Studies in Property Law Vol 5* (Hart Publishing, Oxford, 2009) 203 and the references cited therein; S Gardner 'Family Property' (n 1).
[19]The reason for this example of judicial inventiveness was that it was further argued that these family assets should be subject to sweeping discretionary powers of the courts to vary beneficial interests as they saw fit pursuant to the Married Women's Property Act 1882 s17.
[20]See the explanation in *Pettitt* (n 4) 823 (Lord Diplock).
[21] *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 WLR 753 [45] (Lord Clarke).
[22]*Gissing* (n 5) 905 (Lord Diplock).
[23] (n 6) 127 (Lord Bridge).
[24] See also *Grant* (n 7) 649 (Nourse LJ). For recent mentions of the requirement for an agreement, see *Gallarotti* (n 14) [5] (Arden LJ) and *Capehorn* (n 14) [17]- [23] (Sales LJ).

established out of the express words of the parties, or be inferred from their conduct. The former cases tend to involve scenarios in which B made an excuse as to why C did not appear on the legal title.[25] B's excuse 'raise[s] a clear inference that there was an understanding between [C] and [B], or a common intention, that [C] was to have some sort of proprietary interest in the house; otherwise no excuse for not putting her name onto the title would have been needed.'[26]

Particular issues arise in relation to inferred common intention parol agreement trusts, for it is arguable that, in many cases involving an inferred common intention, there is no real agreement at all.[27] If this argument is accepted, then such trusts cannot be considered to be parol agreement trusts. But numerous authorities show that an agreement is required. For example, in *Capehorn v Harris*,[28] Sales LJ stated that, in order for a beneficial interest to be established, 'an actual agreement has to be found to have been made, which may be inferred from conduct in an appropriate case.'[29] He further explained that the court has the power to 'infer that nonetheless [i.e. despite not having reached any express agreement] (unbeknown to themselves) the parties did in fact make an agreement by their conduct'.[30] This is in line with observations made in the highest appellate court in *Jones v Kernott*,[31] *Stack*[32] and *Gissing*.[33] If this is accepted, then there is little difficulty in saying that the inferred common intention cases, being cases in which an objective agreement is inferred from the parties' conduct, fall within the ambit of the doctrine of parol agreement

[25] e.g. *Grant* (n 7); *Eaves* (n 7).
[26] *Grant*, ibid 649 (Nourse LJ).
[27] See *Crossco* (n 2) [85] (Etherton LJ) and S Gardner 'Rethinking Family Property' (1993) 109 LQR 263; N Piska 'Constructive Trusts' (n 18) 203; S Gardner 'Family Property' (n 1).
[28] (n 14).
[29] *Capehorn* (n 14) [17] (Sales LJ), delivering the Court of Appeal's judgment.
[30] ibid [23] (Sales LJ), delivering the Court of Appeal's judgment.
[31] [26]-[27] (Baroness Hale Lord Walker), and also [70]-[75].
[32] (n 4) [126] (Lord Neuberger PSC).
[33](n 5) [897] (Lord Reid).

trusts. For example, it is a long-established rule that silence on behalf of a secret trustee when asked by the testator to perform the secret trust is taken to be acceptance of the trust obligation.[34] It is arguable that there is no real agreement in such cases. Even a declaration of express trust may be inferred from the conduct of the parties.[35] In fact, as cases involving an express common intention often arise when B has communicated to C an excuse for not formally granting an interest in the land, there is generally no actual agreement in these cases either. Rather, the excuse 'raise[s] a clear inference that there was an understanding between [C] and [B], or a common intention, that [C] was to have some sort of proprietary interest in the house; otherwise no excuse for not putting her name onto the title would have been needed.'[36] Therefore, it would seem to be unduly restrictive to exclude inferred common intention constructive trusts from the ambit of the doctrine discussed here purely on the basis that there was no actual spoken agreement. It is therefore submitted that both express and inferred common intention constructive trusts may only be established when B and C have entered into a parol agreement whereby B has agreed that C will take a beneficial interest. This is entirely consistent with the first requirement of parol agreement trusts.

5.2.1.2.2 Requirement two: the promise cannot amount to a valid declaration of express trust

This requirement is clearly satisfied in cases of common intention constructive trusts, for these cases invariably arise when the parties have not made any written declaration of trust which satisfies the Law of Property Act 1925, s53(1)(b).

[34] *Moss v Cooper* (1861) 1 J & H 352, 70 ER 782.
[35] *Re Kayford* [1975] 1 WLR 279, Ch.
[36] *Grant* (n 7) 649 (Nourse LJ).

5.2.1.2.3 Requirement three: the promisee must demonstrably have relied on the agreement, and the promisor must know that s/he has, so that it will be a fraud for the promisor to renege thereupon.

One of the findings which emerged from the analysis in this thesis is that detrimental reliance is not a requirement of the doctrine of parol agreement trusts. Assuming that detrimental reliance is a necessary ingredient of a common intention constructive trust, as seems still to be the case when legal title to the property is in B's sole name, then it might seem contradictory to include common intention constructive trusts within the doctrine of parol agreement trusts. What is necessary, according to the doctrine of parol agreement trusts, is to show that the promisee relied on the parol agreement. This aspect was discussed above, at 4.2.1.2, where it was shown that the courts have developed fixed requirements for each type of parol agreement trust in order to ensure that parol agreement trusts are only enforced when the courts are satisfied that the parol agreement has been relied upon and B must have known this to be the case.

Of all of the categories of parol agreement trusts considered above, common intention constructive trusts most naturally fall within category three, alongside *Rochefoucauld* and *Pallant v Morgan*[37] lines of cases. The vendor (A) sells to B in circumstances in which B and C have agreed informally that C should take an interest in the land. It is arguable, however, that, contrary to the position relating to other category three parol agreement trusts, a requirement of detrimental reliance is the most expedient means by which the courts can be satisfied that C relied on the parol agreement in common intention cases. This is due to the nature of the

[37] [1953] Ch 43, CA.

relationship between B and C. As they are in an intimate relationship,[38] the mere fact that C resides in the property and does other things that an ordinary partner of the same nature would do is insufficient to allow the court to reach the conclusion that the parol agreement has been relied upon. If C performs acts relating to the land that are in excess of what would normally be expected of a co-habitee in an intimate relationship with the legal owner of that land, however, then the court can safely conclude that B's promise was relied upon. Thus, whilst in most cases of parol agreement trusts, proof of detriment is not necessary in order to prove reliance, it is suggested here that, owing to the peculiar circumstances in which common intention constructive trusts arise, proving detriment is usually the best way to show reliance in the latter type of trusts. This would not seem to be inconsistent with the classification of common intention constructive trusts as parol agreement trusts, or with the general rule that proof of detriment is unnecessary.

5.2.1.3 Arguments against the classification of common intention constructive Trusts as parol agreement trusts

There are some objections to the classification of common intention constructive trusts as parol agreement trusts. Firstly, the requirement of detrimental reliance would seem incongruous with the doctrine of parol agreement trusts. As explained above, this is not necessarily so. Secondly, it has been argued that common intention constructive trusts do not necessarily turn on the finding of any parol agreement. The above arguments also refute this proposition. Perhaps more significantly, however, fraud has rarely been cited in the courts as relevant to parol

[38]Usually, although the principles may also properly apply when the parties are in a close platonic relationship. See *Oates v Stimson* [2006] EWCA Civ 546 and *Re West Norwood Cemetery* [2005] 1 WLR 2176, CC. Note that, even when the parties are in an intimate relationship, a constructive trust may arise without detrimental reliance if the circumstances are such that reliance can be proven in another way. See *Cox* [2004] EWHC 1486 (Ch), [2004] 2 FLR 1010.

agreement trusts. No mention of the word ‘fraud’ was made in *Stack, Jones, Gissing* or *Rosset*. But one of the key points made in this thesis, emphasised above, at 4.3.6, is that since the enactment of the Law of Property Act 1925, s53(2), there has been a steep decline in judicial references to the prevention of fraud as a reason for recognising parol agreement trusts and a corresponding rise in the frequency of cases in which little attempt was made to explain the underlying justification for the imposition of constructive trusts. Being as the first cases of common intention constructive trusts did not appear until the 1970s, it is unsurprising that the courts have not firmly attributed their enforcement to the prevention of fraud. This does not mean that common intention constructive trusts *ought not* to be understood as arising to prevent fraud.

5.2.1.4 Common intention constructive trusts should be classed as parol agreement trusts

In conclusion to this section, it is suggested that common intention constructive trusts should be recognised as parol agreement trusts, but as a special category in which a requirement of detrimental reliance is appropriate. Being as it is always necessary for the court to be sure that the other party to the parol agreement (A or C, as the case may be) relied upon it, and being as the courts have long been in the habit of laying down fixed rules for each kind of parol agreement trust in order to ensure this, this proposition in no way contradicts the general rule that it is not necessary to prove detrimental reliance in order to raise parol agreement trusts. Aside from proving detriment, which is explainable within the context of nature of the relationship between B and C, there are no requirements for the establishment of common intention constructive trusts which go further than the requirements for the establishment of parol agreement trusts generally. It is therefore submitted that it

should be recognised that the most plausible underlying justification for the enforcement of single ownership common intention constructive trusts is the prevention of fraud.

If single ownership common intention constructive trusts are to be regarded as parol agreement trusts, then doctrinal solutions can be proposed to the current uncertainty surrounding whether detrimental reliance is a necessary ingredient and whether indirect contributions may lead to an inference of common intention. As regards the first issue, it is suggested that detrimental reliance should remain as a necessary requirement because it is a reliable means by which a court can be sure that C relied on the parol agreement rather than acting upon considerations arising out of his or her intimate relationship with B. In respect of indirect contributions, the doctrine of parol agreement trusts cannot provide a firm answer. Of course, for the doctrine to be invoked, there must be strong evidence leading the court to infer that there was an agreement between B and C. Requiring a direct contribution is a means by which to ensure certainty in the law. Perhaps, however, this should not be an irrefutable requirement. Certainly, other strong evidence might properly lead the court to a conclusion that there was, objectively speaking, an agreement between the parties. It would thus be in keeping with equity's general approach to parol agreement trusts for the courts to retain some degree of flexibility as regards what type of conduct will suffice to raise an inference of an agreement.

5.2.2 Co-ownership common intention constructive trusts

5.2.2.1 Introduction to the co-ownership cases

The recent (and controversial) [39] cases of *Stack*[40] and *Jones*[41] provide confirmation that common intention constructive trusts may be employed in the resolution of disputes between cohabitees who have purchased a family home jointly, but have contributed unequally towards the property's acquisition. When land is conveyed into joint names, a statutory trust automatically arises.[42] In the absence of any express declaration evidenced in writing in accordance with s53(1)(b), the strong presumption is that, even in instances where the contributions to the purchase price have been unequal, parties who have co-purchased a family home take as equitable joint tenants.[43] This is because the usual nature of the relationship and financial arrangements between such parties 'is on the face of things a strong indication of emotional and economic commitment to a joint enterprise.' [44] Nevertheless, if it can be demonstrated that the parties' common intention was that the interests should be held other than equally, the quantification of the beneficial interests will be governed by a common intention constructive trust. It was further held in *Jones* that the common intention of co-owners may alter over time so that even if, at the time of the acquisition of the property, the intention was that the parties should take as joint tenants, the beneficial interests may later vary as a result of the parties' common intention.

[39] See Y K Lieu, 'The Secondary-rights Approach' (n 1); M Dixon, 'The Never-Ending Story- Co-Ownership after *Stack v Dowden*' [2007] Conv 456; M Dixon, 'The Still not Ended, Never-Ending Story [2012] Conv 83.
[40](n 4).
[41](n 4).
[42]Law of Property Act 1925, ss34-26.
[43]Although the basic premise is that, because equity follows the law, the co-owners take as joint tenants, in most cases of joint purchases not involving family homes, unequal contributions will rebut this presumption in favour of a tenancy-in-common.
[44]*Jones v Kernott* (n 4) [29] (Baroness Hale and Lord Walker).

5.2.2.2 Is it necessary to prove how the common intention constructive trust arises?

In neither *Stack* nor *Jones* was any justification provided for raising a common intention constructive trust in the co-ownership cases, nor was there any mention of fraud or the necessity of proving reliance, detrimental or otherwise. The common intention constructive trust was merely used as a tool for quantifying the beneficial interests.

In the single ownership cases, prior to considering issues relating to quantification, it must be demonstrated that, through the establishment of a common intention and detrimental reliance, a constructive trust has arisen. In the co-ownership cases, however, there is already a statutory trust in place. Thus, according to the leading cases, the common intention is relevant only as far as quantification is concerned. There is no requirement to establish how and why the constructive trust arises. This seems strange, because the initial trust is a statutory trust, not a constructive trust, so it is difficult to ascertain how the beneficial interest can be quantified as if there were a constructive trust in existence without explaining the grounds upon which the constructive trust arises.

This apparent anomaly might be justifiable if it could be said that the trust in the co-ownership cases is, all along, a statutory trust, and that principles relating to quantification of beneficial interests are merely borrowed from the law relating to common intention constructive trusts and applied to the statutory trust in order to facilitate a just outcome. But if this is so, it is not easy to see how the rule, developed in *Jones*, that the apportionment of the beneficial interests may vary over time according to what was intended by the parties, can be reconciled with the requirement in Law of Property Act 1925, s53(1)(c) that a disposition of an equitable

interest must be in writing, otherwise it is void.

If, for instance, B and C initially share the beneficial interest equally, and their common intention changes so that B has a 25% beneficial interest and C a 75% beneficial interest, this would seem to amount to a disposition of an equitable interest. In effect, the parties have agreed without writing that 25% of B's beneficial interest to be transferred to C. It will be recalled that although s53(2) of the Law of Property Act exempts 'implied, resulting and constructive trusts' from the ambit of s53(1)(c), there is no provision exempting statutory trusts from the ambit of s53(1)(c). Thus, if, in the co-ownership cases, the principles of common intention constructive trusts relating to quantification are merely borrowed and applied to a statutory trust, it is arguable that the requirement in s53(1)(c) is being overlooked, for, according to this construction, the court is sanctioning the transfer, without writing, of a beneficial interest which falls outside of the ambit of s53(2).

A further point of interest is that an agreement whereby B promises to transfer 25% of his beneficial interest to C in return for C's promise to assume greater financial responsibility, as happened in *Jones*, would seem to amount to a contract for the sale of the interest in the land. Accordingly, it should be governed by the Law of Property (Miscellaneous Provisions) Act 1989, s2(1), which requires contracts for the sale of land or interests therein to be in writing. Although, by virtue of s2(5), s2(1) does not 'affect the creation or operation of resulting, implied or constructive trusts', there is again no exemption for statutory trusts.

Of course, if the trust by which the beneficial interests are apportioned is a constructive trust which supersedes the statutory trust, then these difficulties are obviated by s53(2) of the 1925 Act and s2(5) of the 1989 Act. It is strongly

suggested, therefore, that the co-ownership cases are best viewed as cases in which a common intention constructive trust arises which supersedes the underlying statutory trust. It is thus necessary to explain how and why this constructive trust arises.

5.2.2.3 How may a parol agreement constructive trust arise in the co-ownership cases?

In co-ownership cases, it is possible to justify the imposition of a common intention constructive trust by reference to the requirements for parol agreement trusts. It is helpful if the vendor is regarded as A, the lessor contributor as B and the greater contributor as C. If, prior to or contemporaneously with the acquisition of the land, B and C enter into a parol agreement (either tacitly or expressly[45]) that the beneficial interests will be allocated unequally, but no written declaration of trust is made, it may be argued that C relied on the parol agreement by refraining from insisting that the trust be declared in writing. It would therefore be a fraud for B to rely on the informality and renege upon the parol agreement, thereby acquiring a 50% beneficial interest as a joint tenant at the expense of C. If this reasoning is accepted, the expansion of the ambit of common intention constructive trusts into instances of co-ownership does not preclude such trusts from being considered parol agreement trusts of the type discussed in this thesis.

Subsequent variations of the beneficial interests, as was permitted in *Jones*, may also be explained with reference to the principles governing parol agreement trusts. In *Jones*, B and C initially took as joint tenants. The new common intention, or parol

[45]Because of the nature of a normal relationship between cohabiting partners in a quasi-matrimonial relationship, in the absence of an express parol agreement, it will be unusual for the conduct of the parties to be such that that court can draw an inference that unequal beneficial ownership was intended. This explains why cases of the nature considered in this section should not arise with any degree of frequency.

agreement, arose (as the court inferred) when the relationship between B and C was dissolved and B began to live elsewhere. There parol agreement was that the parties would no longer share the beneficial interest equally, but rather that C would take a larger beneficial interest. C then began to assume far greater financial responsibility in respect of the house and associated costs. In these circumstances, it would not be unreasonable to say that a court could conclude that C had relied on the parol agreement, for if, at the time that B left the property, he had stated that he was unwilling to countenance any change in the beneficial interests, then it is most unlikely that C would have assumed such responsibilities. It thus follows that it could be concluded that it would be a fraud for B to rely on the lack of any formal disposition to C of any part of his equitable interest. Hence, a parol agreement constructive trust would be raised in C's favour for the prevention of fraud.

5.2.3 Quantification of the beneficial interest

Regardless of whether a common intention trust is one concerning single or joint legal ownership, the court must quantify each party's beneficial interest. A source of perennial discord is the question of which principles the courts must employ in order to do this.[46] Application of the parol agreement trust doctrine provides the answer; it would be fraudulent for the legal owner to depart from the parol agreement, so therefore, by logical extension, the beneficial interests may only be quantified with reference to what was agreed. Of course, the parties may not (and probably will not) have expressly agreed precisely how the beneficial interest is to be quantified,[47] so the court may infer what was agreed with reference to the conduct of the parties. This is perfectly permissible within the doctrine of parol agreement trusts. For

[46] This issue is discussed at length in *Stack* (n 4).
[47] Other than, of course, in cases where the beneficiary is to take a 100% beneficial interest, such as *Rochefoucauld* (n 17); *Samad v Thompson* [2008] EWHC 2809 (Ch), [2008] NPC 125.

example, in *Pallant,* the beneficial interests were quantified based on 'the proper inference from the facts'.[48] Similarly, in *Banner Homes Group plc v Luff Ltd*,[49] the constructive trust took effect as 'contemplated under the arrangement reached between [the parties]'.[50]

In *Jones*, however, the Supreme Court recently held that if:

> it is impossible to divine a common intention as to the proportions in which [the beneficial interest is] to be shared... the court is driven to impute an intention to the parties which they may never have had...'[51] and that such imputation is to be determined as 'the court considers fair having regard to the whole course of dealing between them in relation to the property'[52]

It is difficult to justify doctrinally any such imputations. The defendant who fails to adhere to terms which were never agreed can hardly be considered to be a perpetrator of a fraud for not adhering to the non-existent terms. If the court quantifies the beneficial interests other than in accordance with what, on the balance of probabilities, was agreed between the parties, it is sanctioning a fraud rather than preventing it because the defendant will effectively be forced by the court to deal with the property otherwise than in accordance with the express or inferred agreement upon which the claimant has relied.

A final concern is that it is difficult to conceive of circumstances where, having found a parol agreement and determined that departure therefrom would constitute a fraud,

[48] *Pallant* (n 37) 49 (Harman J)
[49] [2000] Ch 437, CA.
[50] ibid 402.
[51] *Jones v Kernott* (n 4) [31] (Baroness Hale and Lord Walker).
[52] ibid [51] (Baroness Hale and Lord Walker), citing *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 [69] (Chadwick LJ).

the court would then be unable to construe what was intended from the available evidence unless, of course, the courts are in the habit of inferring parol agreements in circumstances in which such an initial inference cannot be justified.[53]

5.2.4 Conclusion

In terms of development of the law, the path that the law of common intention constructive trusts is taking is one which seems to meander according to judicial whims, with no doctrinal framework to provide any mooring point. Recent decisions of the highest appellate court have brought about a raft of debate, some derision,[54] and have failed to provide certainty. It is therefore suggested that it is high time that judicial consideration is given to the doctrinal principles which underpin this area of law. It is further contended that common intention constructive trusts were likely born out of principles governing parol agreement trusts, and ought to be henceforth treated as parol agreement trusts. The benefits of classifying common intention constructive trusts as such are that this would provide a fraud-based doctrinal basis for the resolution of many of the current uncertainties which plague this area of law. More specifically, if common intention constructive trusts are classified as parol agreement trusts, the following propositions can be made:

1) in single purchaser cases, the requirement of detrimental reliance should remain;

2) in single purchaser cases, inferring a parol agreement from contributions or

[53]In instances where the agreement as regards the quantification really cannot be inferred, then maybe recourse should be had to the time-honoured maxim, equity is equality. This was, in fact suggested in *Cobbe v Yeoman's* Row, [2008] UKHL 55, [2008] 1 WLR 1752 [30] (Lord Scott) and also in *Pallant* (n 37) 49 (Harman J). For recent example of cases in which the court was driven to impute the common intention, see *Graham-York v York* [2015] EWCA Civ 72; *Barnes v Phillips* [2015] EWCA Civ 1056; [2015] Fam Law 1470. The excessive eagerness of the courts to impute a common intention in these cases is criticised by A Hayward, 'Common Intention Constructive Trusts and the Role of Imputation in Theory and Practice' [2016] Conv 233.
[54] See especially Dixon, 'The Still not Ended… Story' (n 39).

actions other than direct contributions to the purchase price would not impugn upon the doctrine (although there is a danger of excessive uncertainty in the law);

3) in the co-ownership cases, it should be necessary to explain the grounds upon which the common intention trust, which supersedes the statutory trust, arises. This can be done by applying principles relating to parol agreement trusts;

4) imputation of a parol agreement for the purposes of quantification of the beneficial interest is doctrinally unsupportable.

5.3 The Relationship between Parol Agreement Constructive Trusts and Proprietary Estoppel

5.3.1 The requirements of the doctrine of parol agreement trusts v the requirements for proprietary estoppel

The relationship between proprietary estoppel and common intention constructive trusts has been given a relatively high degree of judicial and academic discussion, with most agreeing that estoppel is a doctrine which is distinct from constructive trusts.[55] This part of the thesis will consider the relationship between the doctrine of parol agreement trusts and the doctrine of proprietary estoppel. There are many similarities between the two doctrines. Both prevent equitable fraud, and both can be invoked when the defendant reneges upon a promise which has been relied upon by

[55] See, for example, *Thorner v Major* [2009] UKHL 18 for a discussion of the relationship. See also T Etherton 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle [2009] 2 Conv 104.

the claimant. A successful action in proprietary estoppel might lead to the declaration of a constructive trust. The requirements for proprietary estoppel were summarised by Lord Walker in *Thorner v Major*:[56]

> most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.[57]

It can be observed that these requirements are different from the requirements of the doctrine of parol agreement trusts, as elucidated above, at 4.4. In order for a parol agreement constructive trust to be imposed, a bilateral agreement is required, whilst a unilateral representation or assurance will suffice for the invocation of proprietary estoppel. Furthermore, whilst the doctrine of parol agreement trusts invariably results in the recognition of a beneficial interest, a wide range of remedies, including, for example, damages in lieu of an interest, is available in successful estoppel suits.[58] Finally, proprietary estoppel requires proof of *detrimental* reliance, whilst mere reliance will suffice to establish a parol agreement constructive trust.

5.3.2 The scenarios to which the two doctrines may apply

In terms of the function of the two doctrines, there is some overlap as to the scenarios to which they might apply, not least because a defendant's promise which forms part of a parol agreement will also count as a representation or an assurance for the purpose of establishing a claim in estoppel. Nevertheless, there are many scenarios which are within the domain of proprietary estoppel and outside of the

[56] [2009] UKHL 18, [2009] WLR 776.
[57] ibid 29. For a more detailed analysis, see B McFarlane and P Sales, 'Promises, Detriment and Liability: Lessons from Proprietary Estoppel' (2015) 131 LQR 610.
[58] *E.g. Baker v Baker* (1993) 25 HLR 408, CA.

scope of the doctrine of parol agreement trusts. Obvious examples are those instances in which the claimant is promised and/or is granted by the courts a remedy other than a beneficial interest in the property. Furthermore, it would seem that cases in which the assurance or agreement was made by the defendant some time after his acquisition of title to the property also fall within the exclusive ambit of estoppel. It will be recalled from 4.4, above, that the doctrine of parol agreement trusts requires that the defendant must agree to use the property for a certain purpose *upon receipt* of that property. In none of the cases concerning any of the three categories of parol agreement trusts was the trust enforced when B already owned the property at the time at which the parol trust was entered into.

Indeed, it has been held in the House of Lords that constructive trusts of the kind discussed here could not arise when '[B] owned the property before [C] came upon the scene.'[59] Even in common intention constructive trust cases, the courts have shown the same curious reluctance to recognise trusts arising out of post-acquisition parol agreements.[60] Contrarily, there are numerous authorities in which proprietary estoppel was successfully pleaded where the assurance or representation was made after the representor had acquired the land in question.[61] It thus seems that, over a very long period, the courts have consistently invoked proprietary estoppel in the resolution of cases in which a landowner perpetrated a fraud by reneging upon a promise, assurance or parol agreement made some time after his/her acquisition of

[59]*Cobbe* (n 53) [37] (Lord Scott). See also *Re Goodchild* [1997] 1 WLR 1216, CA, 1229-1230.
[60] In *Rosset* (n 6) 132 (Lord Bridge), it was held that a common intention arising post-acquisition can only 'exceptionally' give rise to a common intention constructive trust. See also *Bernard v Josephs* [1982] Ch 391, CA, 404 (Griffiths LJ); *Morris v Morris*, [2008] EWCA Civ 257; [2008] Fam Law 521 [19] (Peter Gibson LJ); *Mirza v Mirza* [2009] EWHC 3 (Ch), [2009] 2 FLR 115 [122] (Stephen Smith QC sitting as Deputy Judge).
[61]See, for example, *Dillwyn v Llewelyn* (1862) 4 De G F & J 517, 45 ER 1285; *Gillett v Holt* [2001] Ch 210, CA; *Greasley v Cooke* [1980] 1 WLR 1306, CA; *Henry v Henry* [2010] UKPC 3, 1 All ER 988; *Inwards v Baker* [1965] 2 QB 29, CA; *Jennings v Rice* [2002] EWCA 159, [2003] 1 FCR 501; *Pascoe v Turner* [1979] 1 WLR 431, CA; *Plimmer v Wellington Cor.* (1884) 9 App Cas 699; *Ottey v Grundy* [2003] EWCA Civ 1176, [2003] WTLR 1253; *Willmott v Barber* (1880) 15 Ch D 96; *Davies v Davies* [2016] EWCA Civ 463.

the land and upon which the other party relied. It is therefore suggested that one of the features which distinguishes proprietary estoppel from the doctrine of parol agreement trusts is that a successful action in estoppel does not depend upon the defendant's acquisition of the property being subject to the equity.

5.3.3 Why does the doctrine of parol agreement trusts only apply to pre-acquisition agreements?

It may seem curious that parol agreement trusts only seem to arise in respect of pre-acquisition parol agreements. There seems to be no obvious reason why this is so. Certainly, the fraud is arguably the same if B reneges upon a post-acquisition parol agreement that has been relied upon as if he reneges upon a pre-acquisition parol agreement that has been relied upon. It has been suggested that if a parol agreement is entered into when B already owns the property, then it cannot be said that the land was transferred to him in reliance on the parol agreement, or that B has gained anything as a result of the parol agreement.[62] As has been demonstrated in chapter 3, above, however, there are many cases of parol agreement trusts, *Rochefoucauld* and *Pallant* included, in which A did not transfer the land on the strength of the parol agreement, and there is no requirement that B should be able to benefit personally from any failure on his part to perform the parol agreement. Expansion of the doctrine of parol agreement trusts into instances involving post-acquisition parol agreements, therefore, would not impugn upon any of the underlying justifications for the doctrine that are proposed here. Moreover, it is possible that the courts' failure to recognise post-acquisition parol agreement trusts is based on the misapprehension that, in cases such as *Rochefoucauld*, it is

[62] McFarlane, 'The Centrality of Constructive and Resulting Trusts', in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart, Oxford, 2009), 183-204, 201.

necessary to show that the land was conveyed to B by A on the strength of the parol agreement.

In the final analysis, what is certain is that, regardless of the reasons why post-acquisition parol agreements cannot give rise to parol agreement constructive trusts, the authorities strongly suggest that the law is settled in this respect, and that parol agreements entered into by a party who already owns the subject matter of the parol agreement fall within the domain of the similar, but distinct, doctrine of proprietary estoppel.

5.3.4 The two doctrines should remain separate

In summary, the doctrines of parol agreement trusts and proprietary estoppel are conceptually different, have different requirements, and each is capable of applying to scenarios beyond the ambit of the other.[63] It should further be added that a range of remedies may be imposed in the event of a successful action in estoppel, many of which fall short of the granting of a beneficial interest under a trust.[64] It is thus submitted that, notwithstanding the overlap in the situations to which each doctrine may apply, there is ample justification for regarding the two doctrines as distinct from one another.

[63] M Dixon, 'Developments in Estoppel and Trusts of Land' [2015] Conv 469, makes the point that proprietary estoppel is often invoked in cases involving 'a family farm and/or disappointed children who claim to have been promised some present right or future inheritance, only to have it snatched away by fickle parents or relatives.'
[64] For a recent example, see *Davies* (n 61).

5.4. Are Mutual Wills Parol Agreement Trusts?

5.4.1 Introduction to mutual wills

Mutual wills, like secret trusts, have attracted a significant volume of case law.[65] The purpose of this section, rather than to analyse all of these authorities, is simply to explore the extent to which mutual wills might be governed by the doctrine of parol agreement trusts.[66] Mutual wills arise when two testators (T1 and T2) execute identical wills and promise one another that the wills will not be amended at any point in the future. Usually T1 and T2 will bequeath one another's estate to each other for life with remainder to a beneficiary (B). Upon the death of T1, T2 (or vice versa) is obliged to apply T1's estate according to the mutual will so that, upon T2's death, if T2 has bequeathed the property to another party, T2's executors and/or that party will take as constructive trustee for B under the mutual wills.[67] Perhaps more surprisingly, T2's own estate must also be applied according to the mutual wills. Thus, upon the death of T1, T2 will hold T2's own estate on constructive trust for B,[68] although this seems to be a constructive trust which does not 'bite' until T2's death, and has been called a 'floating trust'.[69] Since very early times, it has been held that mutual wills are enforced for the prevention of fraud for the same reasons as secret trusts.[70] It is also apparent that this fraud does not depend on any personal gain

[65] *Re Dale* [1994] Ch 31, Ch.
[66] In attempts to rationalise the kinds of trusts labelled in this thesis, it has been argued that mutual wills are (S Gardner, 'Reliance-based Constructive Trusts', Mitchell, *Constructive and Resulting Trusts* (n 62)) and are not (McFarlane, 'Constructive Trusts' (n 66)) enforced pursuant to the same principles.
[67] See *Healey* (n 16).
[68] See, for example, *Charles v Fraser* [2010] EWHC 2154 (Ch), [2010] WTLR 1489; *Fry v Densham Smith* [2010] EWCA Civ 1410, [2011] WTLR 387.
[69] See, for example, *Goodchild* (n 59) 1225 (Leggatt LJ). This might provide a doctrinal precedent for the 'ambulatory constructive trust' proposed in *Stack* (n 4) [62] (Baroness Hale) and *Jones v Kernott* (n 4) [14] (Lord Walker and Baroness Hale).
[70] *Dufour v Pereira* (1769) Dick 419, 21 ER 332. A full version of Lord Camden LC's judgment in *Dufour* (fuller than appears in Dicken's report), in which the affinity between secret trusts and mutual wills is explained in some detail is quoted in *Dale* (n 65) 40-42 (Morritt J).

being obtained by the person who breaches the confidence.[71] Strangely, however, it has also apparently long been a requirement that the agreement between T1 and T2 must amount to a valid contract.[72] Indeed, it has recently been held that the agreement between T1 and T2 must comply with s2 of the Law of Property (Miscellaneous Provisions) Act 1999.[73]

5.4.2 The juxtaposition between mutual wills and parol agreement trusts

The liability of T2 in respect of property received under the will of T1 clearly falls within the model of parol agreement trusts as presented in this thesis. T1 relied on the agreement when bequeathing his/her estate to T2, and T2 knew this to be the case. Of course if, as is often the case, T2 has received T1's estate subject to a life interest bestowed by T1's will, then T2 will have no entitlement to capital, and it will not be necessary to apply the doctrine of parol agreement trusts. But if, as in *Healey v Brown,*[74] the mutual wills related to land which was, at the time of T1's death, held by T1 and T2 as joint tenants then, although T2 takes absolutely by operation of law, T2 will take T1's share on trust for the agreed beneficiary pursuant to secret trust principles.[75]

More problematic is the question of why, after T1's death, as long as the agreement between T1 and T2 amounted to a valid contract, T2's own property is subject to a constructive trust which ensures that this property is distributed according to the terms of the mutual wills. The appropriateness of the requirement for a valid contract,

[71] *Dale,* ibid.
[72] This aspect is apparent from Dicken's report: *Dufour* (n 70). See also *Goodchild* (n 59) 1225-1225 (Leggatt LJ); *Re Walters* [2008] EWCA Civ 782, [2009] Ch 212; *Healey* (n 16). The requirement for a valid contract is accepted by Glister and Lee, *Hanbury & Martin* (n 13) 268; McFarlane and Mitchell, *Hayton & Mitchell* (n 13) 121.
[73] *Healey* (n 16).
[74] ibid.
[75] Ibid [28] (Donaldson QC sitting as Deputy High Court Judge).

although confirmed by several authorities,[76] is not universally accepted.[77] In *Re Dale*,[78] counsel for the beneficiary pertinently pointed out that at the time of *Dufour v Pereira*,[79] the case which appears to be the source of the rule that there must be a valid contract, the law did not permit a husband and wife to enter into contractual relations with one another. The fact that T1 and T2 were husband and wife suggests that when Lord Camden LC mentioned a 'contract', was not speaking of a legally binding contract, more of an agreement of the type which is common to parol agreement trusts. In fact, in *Dufour*, Lord Camden explained that T2's liability in respect of her own estate rested on the same principles as governed the liability of secret trustees.[80] Essentially, T2 promised that he would bequeath his own property in a certain way, and T1 relied on this promise. If *Neale v Willis*[81] is recalled, D (who was neither the person who transferred the trust property to B, nor the beneficiary of the parol agreement) relied on B's promise that, upon B's acquisition of land from A, B would grant C an interest in the land. By analogy, in the case of a mutual will, D (T1) relied on B's (T2's) promise that B would bequeath B's land to C. The only difference is the absence of a person (A) conveying the property in question to B; in effect, this was a parol agreement entered into by B in respect of property that he already owned. As has been explained above, at 5.3.3, however, post-acquisition parol agreements, as a general rule, have been held incapable of generating parol agreement trusts. This, coupled with the fact that, according to the current law, the agreement between T1 and T2 must seemingly satisfy the requirements for a valid contract, shows that, at least in respect of T2's constructive trusteeship, the doctrine

[76] See *Goodchild* (n 59); *Healey* (n 16).
[77] See *Walters* (n 72), [2009] Ch 212.
[78] (n 65).
[79] (n 70).
[80] ibid. Lord Camden LC cited *Thynn v Thynn* (1684) 1 Vern 296, 23 ER 479; *Devenish v Baines* (1689) Prec Ch 3, 24 ER 2; *Chamberlaine v Chamberlaine* (1678) 2 Freem 34, 22 ER 1041.
[81] (1968) 19 P & CR 836, CA.

of mutual wills is distinct from the doctrine of parol agreement trusts. Nevertheless, it must be accepted that, at least in terms of doctrinal origin, the two types of trust are very closely intertwined. It is also notable that the controversial idea of the 'floating trust' (although not so named) is also found in some older authorities concerning parol agreement trusts, and has not attracted controversy in this context.[82] Furthermore, it has been suggested that in the recent case of *Re Walters*,[83] the Court of Appeal actually held that a mere agreement, rather than a valid contract is, or at least should be, sufficient for the operation of the doctrine of mutual wills.[84] Should the requirement for a valid contract be definitively abandoned in the future, it would, perhaps, be difficult to argue that even T2's constructive trusteeship of his own estate is not established pursuant to the doctrine of parol agreement trusts. Such a development in the law would, however, require further exploration of the current position that parol agreement trusts cannot usually arise in respect of post-acquisition parol agreements. As matters stand, however, the doctrine of mutual wills, as it affects T2's own property, would seem to represent a peculiar hybrid between the common law rules of contract law and the equitable rules relating to parol agreement trusts.

5.5 The 'Subject to Contract' Cases

There is a line of cases which suggests that a purchaser of land (B) may be held to have taken the land subject to a constructive trust for the benefit of a third party (C) when B agreed with the vendor (A) that he would take the land subject to a right that

[82] E.g. *Drakeford v Wilks* (1747) 3 Atk 539, 26 ER 1111.
[83] (n 72).
[84] See P Luxton, 'Walters v Olin: uncertainty of subject matter - an insoluble problem in mutual wills?' [2009] Conv 498.

A (or A's predecessor in title) had granted to C and which would otherwise be unenforceable against B.[85] Such constructive trusts, which can arise when the contract of sale between A and B expressly stated that the purchase was subject to C's rights, have been recognised when C was originally a contractual licensee,[86] or had unprotected rights in registered land under a specifically enforceable contract.[87] It has been held that such a constructive trust is a new interest, arising upon the conveyance by A to B. As such, these trusts may be recognised even in registered land when C's original right was not protected by entry on the register of title.[88] The requirements for the imposition of these trusts as divined from the two most recent Court of Appeal decisions, can be summarised as follows:[89]

1) C must have a prior interest (in all of the cases, this has been a contractual interest) which, in the circumstances would be unenforceable against B;
2) The contract of sale must state that B has taken subject to C's interest;[90]
3) B must have taken with his conscience affected so as to take subject to a constructive trust (or another right that can be granted in equity, such as an equitable easement) giving effect to what was agreed with A.

In order to satisfy the third requirement, it is necessary to demonstrate that B 'has undertaken a new obligation, not otherwise existing, to give effect to the relevant

[85] See *Binions v Evans* [1972] Ch 359, CA; *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044, Ch; *Ashburn Anstalt v Arnold* [1989] Ch 1; *Lloyd v Dugdale* [2002] 2 P & CR 167; *Chaudhary v Yavuz* [2011] EWCA Civ 1314.
[86] *Binions* (n 85).
[87] *Lyus* (n 85).
[88] ibid. See also *Collings v Lee* [2001] 2 All ER 332, CA. The relevant statutory provisions are contained in the Land Registration Act 2002, ss28-29.
[89] See *Chaudhary* (n 85) [55] (Lloyd LJ), quoting *Lloyd v Dugdale* [2002] EWCA Civ 1314, P & CR 167 [52] (Slade LJ).
[90] It has not been directly stated that that 1) and 2) are requirements for 'subject to contract trusts'. However, in all of the cases in which this doctrine has been discussed it has been assumed that cases in which C has a prior interest and there is an express provision in the contract whereby B promises to respect that interest form a discrete line to which particular considerations apply.

incumbrance or prior interest.'[91] C may prove this if the sale from A to B was stipulated to be subject to C's right *and* there is evidence that B intended to afford C a new right deriving from C's original right. Such evidence could, for instance, include a reduction in the purchase price.[92]

The 'subject to contract' cases have been subjected to various academic criticisms. It has been suggested that these trusts are subversive to the doctrine of consideration[93] and to the statutory land registration regime.[94] The notion that a 'subject to contract constructive trust' might arise when C's original right was a mere contractual licence has provoked particular criticism on the ground that licences, unlike constructive trusts, are mere personal rights.[95] Indeed, it has been suggested that the phrase 'constructive trust', in cases concerning contractual licences, is a misnomer used to describe equitable enforcement of a personal right.[96]

Some cases concerning parol agreement trusts, especially *Bannister v Bannister*,[97] have been cited as authorities which underpin these 'subject to contract' cases,[98] and some commentators have suggested that these cases are enforced pursuant to the same principles which justify cases concerning parol agreement trusts.[99] It has also been held that the reason for the imposition of the constructive trust in such cases is the prevention of 'fraud in the sense in which the term is used in a court of

[91] *Chaudhary v Yavuz* (n 85) [55] (Lloyd LJ), quoting *Lloyd* (n 89) [52].
[92] ibid.
[93] M P Thompson, 'Leases, Licences and the Demise of Errington [1988] Conv 201, 206.
[94] M. P Thompson, *Modern Land Law* (4th edn., OUP, Oxford, 2009), 151.
[95] Thompson, 'Leases, Licences' (n 93) 206; McFarlane and Mitchell, *Hayton & Mitchell* (n 13) 671; McFarlane, Hopkins and Nield, *Land Law* (n 13) 720.
[96] B McFarlane, 'Constructive trusts arising on a receipt of property sub conditione (2004) LQR 667, 691.
[97] [1948] 2 All ER 133, CA
[98] *Bannister,* ibid, was cited in *Binions* (n 85) 368 (Lord Denning MR); *Lyus* (n 85) (Dillon J)*; Ashburn Anstalt v Arnold* [1989] Ch 1, CA, 23-25 (Fox LJ). Additionally, *Pallant* (n 37) was cited as authority for the same proposition in *Lyus* (n 85) 1052, as was *Rochefocuauld* (n 17) 1055. *Bannister* was also cited in *DHN Food Distributors Ltd v Tower Hamlets BC* [1976] 1 WLR 852, CA, 859 (Lord Denning) as authority that the granting of 'an irrevocable licence' may lead to the imposition of a constructive trust.
[99] E.g. Glister and Lee, *Hanbury & Martin* (n 13) 277-278.

equity'.[100] Certainly, these constructive trusts can be seen as being very closely aligned with parol agreement trusts. Owing to B's agreement with A that he will respect C's 'rights', it becomes fraudulent for B to renege upon his promise. The fraud, then, is arguably the same as that which triggers the doctrine of parol agreement trusts, for, without clear evidence that A relied on B's undertaking by, for example, accepting a reduced price, C's claim will fail. The 'subject to contract' cases differ, however, in respect of the apparent requirements relating to the contract between A and B and the existence of C's prior contractual interest. As this doctrine has only ever been invoked, successfully or otherwise, in relation to land, it would seem that the contract between A and B, which is expressly subject to C's rights, must satisfy s2 of the Law of Property (Miscellaneous Provisions) Act 1989. Hence, something more than a mere parol agreement between A and B is required.

It is suggested here that the law relating to the 'subject to contract' cases has been over-complicated and that these constructive trusts ought to have been explained simply as parol agreement trusts as per the doctrine as laid down in this thesis. In *Lyus v Prowsa Developments Ltd*,[101] A's predecessor in title had granted to C an estate contract. According to the contract of sale between A and B, B promised to respect C's estate contract, and A thus sold at a reduced price. Probably the best explanation of the case is that, in actuality, B did not agree to honour the estate contract. The estate contract, as the parties knew, was unenforceable against B, and it is established that the constructive trust which arises in such cases represents a new right, not a continuation of the old right. In effect, then, what B agreed was to sell a certain part of the land to C on the same terms as had been agreed by A's predecessor in title, and A clearly relied on B's promise. If a slightly different version

[100] *Lyus* (n 85) 1052 (Dillon J).
[101] (n 85).

of the scenario in *Lyus* is imagined, whereby the agreement between A and B was purely oral, rather than appearing in the contract, the result would be the same; A relied on B's promise to sell part of the land to C.[102] Imagine a second alteration to the facts of *Lyus* whereby C had no pre-existing estate contract and A and B agreed that, upon taking title, B would sell part of the land to C. Again, according to the doctrine of parol agreement trusts, the result would be the same. It thus seems, that, in the 'subject to contract constructive trust' cases, whether or not the agreement between A and B is reduced to writing, and whether or not C had a pre-existing contractual interest, should be of no consequence. Assuming significance to these issues obscures the fact that these cases can be resolved on *exactly* the same grounds as the other cases of parol agreement trusts which are considered here. Furthermore, any constructive trust raised in such a manner is a new constructive trust, no more within the ambit of the land registration requirements as a resulting trust arising upon a conveyance. There would, however, be little danger of a multiplicity of claims eroding the land registration requirements because of the necessity of proving that A relied on the agreement, parol or otherwise, with B. Absent a reduction in the purchase price, it would be difficult for C to establish A's reliance.

Binions v Evans,[103] the only other case in which the doctrine was successfully invoked, is rather more difficult to justify. B agreed with A that he would allow C to remain in occupation on the same terms as had been agreed in writing between A and C. Assuming that the written agreement created a mere contractual licence,[104]

[102]Examples of parol agreement trusts in which constructive trusts arose out of promises to sell a certain part of the land upon receipt include *Chattock v Muller* (1878) LR 8 Ch D 177; *Pallant* (n 37); *Banner Homes* (n 49).
[103] (n 85).
[104] In *Binions* (n 85), Lord Denning MR held that a contractual licence had originally been granted to C by A. The majority, Megaw and Stephenson L JJ, held that what had actually been granted by A was a life interest

the arguments that a trust ought not to arise out of B's promise to create a new personal right (i.e. a new licence) seem convincing. Notably, however, in *Bannister*, B promised A that she could 'stay in No 30 as long as she liked rent free.'[105] According to Lord Denning MR, this was the essence of the promise in *Binions*, notwithstanding that the formal agreement gave A the right to evict C upon the giving of a specified notice, which would seem to preclude the agreement being construed as an attempt to confer a life interest under a trust. If, as was held in *Bannister*, a mere parol agreement is sufficient to raise a constructive trust, it is arguable that, were a different result reached in a case such as *Binions*, the law would be penalising C for reducing to writing, in the usual written form, the essence of what was agreed less formally in *Bannister.* Therefore, if the substance of the written agreement between A and C was that C could live in the land for life, then it is arguable that this is also the substance of what B agreed, and what A relied upon. Upon this construction, a parol agreement trust arguably could be raised.[106]

The above discussion notwithstanding, it should be noted that, as has been pointed out,[107] scenarios such as *Lyus* and *Binions* could now be resolved through application of the Contracts (Rights of Third Parties) Act 1999, which would allow C to sue B upon the contract of sale, notwithstanding the lack of privity. This approach would provide C with relief without any need to address the complexities of trust law, or the doctrine of parol agreement trusts. This would suggest that, in future, the principles of equity may be redundant in cases of the kind discussed in this section. It should, however, be recognised that these principles have been discussed in post-

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under the Settled Land Act 1925, and that B had re-granted this equitable interest in writing in the contract, making it inherently binding upon B.

[105] *Bannister* (n 97) 135 (Scott LJ).

[106] See McFarlane, 'Constructive Trusts' (n 96) 673 for a similar explanation.

[107] Thompson, *Modern Land Law* (n 94) 151.

1999 Act cases, so it seems that there might still be a place in the law for ‘subject to contract constructive trusts’

In conclusion to this section, it is submitted that the ‘subject to contract constructive trust’ cases ought simply to have been determined according to the doctrine of parol agreement trusts whenever what has been agreed was capable of being given effect through the imposition of a trust, but that the scope for equity’s future intervention in this area would seem to have been constrained by the 1999 Act. Thus, in this area, the law of contract might well have superseded the doctrine of parol agreement trusts.

5.6 Doctrinal Relations Between Parol Agreement Trusts and Other Constructive Trusts

5.6.1 The modern position of parol agreement trusts within constructive trusts

There is perhaps no body of jurisprudence in which the principles have been obfuscated for so long, and to such an extent, by the inconsistent use of terminology as the law of constructive trusts. Notably, pre-twentieth century judges were not, as a general rule, afflicted by the modern preoccupation with classifying trusts. As has been seen, however, when questions arose as to the applicability of the limitation period laid down in the Trustee Act 1888 and previous limitation regimes, the courts were obliged to determine whether certain trusts should be treated as constructive or express trusts.[108] Those trusts which placed the trustee in a position similar to that of a formally appointed trustee were treated as if they were express trusts, whilst trusts which merely gave the claimant an equitable proprietary interest in the property were classed as constructive trusts. The historical classification of trusts for limitation

[108] See in particular 3.3.1.1 and 3.3.1.5-3.3.1.8 above.

purposes is thus instructive as to the perceived nature of those trusts, and may assist in determining whether any other types of non-express trusts bear doctrinal similarities to parol agreement trusts. It should be noted that the limitation regime as it applied to trusts was amended by the Limitation Act 1939, and is now found in the Limitation Act 1980, s21. The pre-1939 cases do not apply directly to the current law as regards the applicability of the current limitation period. They are of great value, however, as they are often the only pre-twentieth century cases in which the classification of trusts was considered in any detail. The current law as regards the running of time against trustees is covered in the leading case of *Williams v Central Bank of Nigeria*.[109]

In *Paragon Finance v DB Thakerar & Co*,[110] Millett LJ gave the most widely accepted version of the modern law of constructive trusts.[111] He stated that constructive trusts could be divided into two classes. The first includes trustees *de son tort*, secret trusts, *Rochefoucauld*-type trusts and those involving 'the *Pallant v Morgan* equity'. In these instances, 'circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.'[112] Thus, in such cases, 'the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff.'[113] According to Millett LJ, these are the kinds of constructive trustees against whom the pre-1939 limitation period did not run.[114] Millett LJ's reasoning was based on several

[109] [2014] UKSC 10, [2014] AC 1189. Note that the limitation regime as it applied to trusts was amended by the Limitation Act 1939, and is now found in the Limitation Act 1980, s21. The pre-1939 cases do not apply directly to the current law as regards the applicability of the current limitation period (see generally *Williams*).
[110] [1999] 1 All ER 400, CA, 408-409.
[111] See generally *Williams* (n 109) for evidence of the esteem in which Millett LJ's words are held.
[112] (n 110) 408-409.
[113] ibid.
[114] Such trustees are similarly immune according to the current regime.

statements from older cases to the effect that time did run against defendants who ostensibly obtained the property for their own benefit but as a result of an unlawful transaction which exposed them to being declared to have taken as constructive trustees.[115]

Millett LJ's second class includes dishonest assistants and knowing recipients. He described these trusts as arising because '[e]quity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity'. As will be explored below, however, Millett LJ took the view that:

> [s]uch a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff.[116]

According to Millett LJ, these are the kinds of 'constructive trustees' against whom the pre-1939 limitation period did run.[117]

Interestingly, Millett LJ did not mention those trusts arising against non-equity's darling recipients of trust property, nor did he refer to constructive trustees of incidental profits, secret commissions or property obtained through self-dealing. It has been held on high authority that the former are not properly to be referred to as trusts,[118] whilst the latter three are constructive trusts.[119]

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[115] Cases relied upon include *Soar v Ashwell* [1893] 2 QB 390, CA; *Taylor v Davies* [1920] AC 636, PC; *Clarkson v Davies* [1923] AC 100, PC.
[116] (n 110).
[117] This also represents current position- see *Williams* (n 109).
[118] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 WLR 802, HL, 707 (Lord Browne-Wilkinson). See also *Williams*, ibid, [31 (Lord Sumption].
[119] See respectively *European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 [2014]; 3 WLR 535; *Boardman v Phipps* [1967] 2 AC 46, HL; *Taylor* (n 115).

For the purposes this part of the thesis, the most important points to note from the above summary of the modern position, based on the leading cases, are as follows:

1) the trusts recognised in this thesis as parol agreement trusts are seen as doctrinally closer to trusteeship *de son tort* than to other kinds of constructive trusts (save, of course, for those specifically covered at 5.2-5.5, above);
2) the recognition of parol agreement trusts is often attributed to unconscionability, as opposed to (or as a synonym of) fraud, the authorities covered in chapters 2-4 of this thesis notwithstanding;
3) parol agreement trustees and trustees *de son tort* are genuine constructive trustees;
4) the pre-1939 limitation period applied to knowing recipients and dishonest assistants because they were constructive trustees who only assumed that position as a result of the plaintiff's impugnment of a breach of a pre-existing trust or fiduciary duty;
5) knowing recipients and dishonest assistants are doctrinally similar and both are made liable on the ground of fraud;
6) neither dishonest assistants nor knowing recipients are trustees;
7) recipients of property who are not 'equity's darling' are not trustees.

5.6.2 Parol agreement trusts compared with 'traditional' constructive trusts

It has been demonstrated above, at 4.3, that parol agreement trusts, prior to *Taylor v Davies*,[120] were not regarded as constructive trustees at all. Nevertheless, the phrase 'constructive trust' was in currency in pre-twentieth century cases.

[120] (n 115).

Constructive trusts were sometimes described as being imposed 'without reference to any presumable intention of the parties'.[121] Examples of such trusts include the trusts which bind recipients of trust property who were other than equity's darling[122] the trusts subject to which trustees and other fiduciaries were compelled to take incidental profits and other unauthorised gains,[123] and the trusts imposed in cases of self-dealing.[124] These trusts were not generally thought of as being imposed for the prevention of actual fraud,[125] although their enforcement was sometimes attributed by commentators to equity's jurisdiction to prevent 'constructive fraud', a phrase used to describe acts which did not involve misconduct but which had a similar effect on the 'victims' to acts which were fraudulent.[126] This can be contrasted with parol agreement trusts, which have long been regarded as arising on the ground of fraud.

Proprietary and *in personam* claims (when indeed *in personam* claims were *prima facie* possible, as in the case, for example, of unauthorised incidental profits) against constructive trustees by beneficiaries of such trusts were generally regarded as time-

[121] J Smith, *A Manual of Equity Jurisprudence* (5th edn, Stevens & Norton, London, 1856) 151. See also J Story *Commentaries on Equity Jurisprudence as administered in England and America* (9th edn, Little, Brown and Co, Boston 1866) 414.

[122] *Portlock v Gardner* (1842) 1 Hare 594, 66 ER 1168; *Soar v Ashwell* (n 115) 405 (Kay LJ). The status of these trusts as constructive trusts is explained in J Smith, *A Manual of Equity Jurisprudence*, (5th edn., Stevens & Norton, London, 1856), 155-156. See also G Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol 2, (Stevens & Norton, London, 1849).

[123] See, for example, *Portlock*, ibid. The status of these trusts as constructive trusts is explained in Smith, *Equity Jurisprudence* (n 121).

[124] *Taylor* (n 115).

[125] See, for example L A Sheridan, *Fraud in Equity* (Pitman, London 1957).

[126] Smith, *Equity Jurisprudence* (n 121) 80-82. Smith's definition of constructive fraud, 60, is as follows: 'Constructive frauds are acts, statements or omissions which operate as virtual frauds on individuals or, if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, and yet may have been unconnected with any selfish or evil design, or may amount, in the opinion of the party chargeable therewith, to nothing more than what is justifiable or allowable.' Smith defined actual fraud (at 48) as 'something done, said or omitted, with the design of perpetrating what the party must have known to be a positive fraud'. As has been demonstrated throughout this thesis, knowingly reneging on a parol agreement which has been relied on would amount to a fraud of this nature. A similar definition of constructive fraud is found in J Story *Commentaries on Equity Jurisprudence as Administered in England and America* Vol 1 (4th edn, Little, Brown and Co, Boston 1866) 219-220. Story also attributes liability for breaches of trust or duty to the prevention of constructive fraud. See also *Evans v Bicknell* (1801) 6 Ves Jun 174, 31 ER 998, 192 (Lord Eldon); *Parr v Jewell* (1855) 1 K & J 671, 69 ER 629, 674 (Page Wood VC); *Patch v Ward* (1867) LR 3 Ch App 203, 213 (Rolt LJ). The phrase was criticised in *Finch v Shaw* (1854) 19 Beav 500, 52 ER 44, 514 (Romilly MR).

barred.[127] This is because constructive trustees had ostensibly acquired the property in question for their own benefit rather than in any fiduciary capacity but were liable to be declared at a later date to have taken on constructive trust upon the proof of certain material facts. The difficulty in establishing such facts many years distant from the events surrounding the disputed transaction was thought capable of undermining security of property rights.[128] On the other hand, parol agreement trustees, having agreed to take on trust, took the property in a fiduciary capacity from the first.

Moreover, constructive trusts were viewed principally as a means by which the Court of Chancery could claim the jurisdiction to order the return or transfer of property, as was conceded by Grant MR in *Beckford v Wade* when his Lordship asked the rhetorical question: '[up]on what grounds is a Court of Equity ever called upon to direct one man to convey a real estate to another, except upon the ground of a trust, either actual or constructive?'[129] Here, Grant MR was seeking to explain the difference between mere constructive trustees and 'actual trustees' who were subject to onerous equitable obligations as a result of having expressly or impliedly undertaken to perform the trust, and against whom the limitation period was no bar. *Beckford* is a very instructive case, for, although it is often cited as a case on knowing receipt, and is cited as an authority that knowing recipients were once thought of as constructive trustees and could hide behind the limitation period, [130] it actually concerned a 'non-equity's darling constructive trustee'.

[127] Examples of cases of traditional constructive trusts in which the claims were held to be time-barred include *Llevellyn v Mackworth* (1745) Barn Ch 445, 27 ER 714; *Townshend v Townshend* (1783) 1 Bro CC 550, 28 ER 1292.
[128] See *Beckford v Wade* (1805) 17 Ves Jun 87, 34 ER 34, 97. See also *Taylor* (n 115) 1203-1204 (Viscount Cave).
[129] ibid, 96.
[130] See *Williams* (n 109) [16] (Lord Sumption).

The facts of *Beckford* are rather imperfectly reported, but close examination of the judgment reveals that the disputed land was sold in 1744 by executors, seemingly in breach of trust. The purchaser was apparently aware of this breach, making *him* a knowing recipient. The claimant commenced a proprietary claim over 60 years later against the person with title to the land at that time. Given the time-frame involved, the defendant was almost certainly a *successor in title* to the original purchaser. The words of the judgment seem also to suggest this. Grant MR stated that 'the Appellants [i.e. the defendants], and those, under whom they claim, have had a possession of more than fifty years under deeds, wills, and other conveyances'.[131] He also referred to the defendants as parties who claimed 'by virtue of [the conveyances in question] or by title deduced from them'.[132] It is thus improbable that the defendant had received with knowledge of the breach of trust. Rather, the defendant had taken a conveyance of trust property and was not equity's darling. As a constructive trustee in the traditional sense, the defendant was permitted to avail himself of the limitation period.

It can be seen, then, that, in terms of the reasons for their imposition and their treatment for the purposes of the statutory limitation period, parol agreement trusts and 'traditional' constructive trusts, in terms of their doctrinal origins and development, bore little relation to one another.

5.6.3 Parol agreement trusts compared with dishonest assistants and trustees de son tort

From a historical perspective, dishonest assistants and trustees *de son tort* share some characteristics with parol agreement trusts, notwithstanding the obvious

[131] *Beckford* (n 128) 88-89.
[132] ibid, 93.

difference that the former are 'strangers' to a trust which already existed before they became involved in any breach. Although they were occasionally described as constructive trustees in the nineteenth century,[133] in fact, during this period, neither dishonest assistants nor trustees *de son tort* were usually referred to or treated as constructive trustees.[134] Furthermore, they were unable to avail themselves of the statutory limitation period.[135] There are, however, plain differences between dishonest assistants and parol agreement trustees. As is generally accepted by modern jurists, dishonest assistants, although liable on the ground of fraud,[136] are not trustees at all, not least because they never assume legal title or any form of trusteeship, and cannot be subject to proprietary claims. They were not made trustees on the ground of fraud. Instead, they were implicated in fraudulent breaches of trust and made liable as if they were trustees who had committed the fraudulent breach.[137] Liability for dishonest assistance, therefore, is purely accessorial and is very different in nature from the trusteeship which is assumed by parol agreement trustees.

It has recently been suggested by Lord Sumption that trustees *de son tort* are similar to 'trustees under trusts implied from the common intention to be inferred from the conduct of the parties'[138] because both the former and the latter lawfully assumed trusteeship and 'intended to act as trustees, if only as a matter of objective

[133] *Barnes v Addy* (1874) LR 9 Ch App 244, 251 (Lord Selborne); *Soar v Ashwell* (n 115) 405 (Kay LJ).
[134] See, for example, *Fyler v Fyler* (1841) 3 Beav 550, 49 ER 216; *Marshall v Sladden* (1849) 7 Hare 428, 68 ER 117; *Portlock* (n 122); *Re Spencer* (1881) 51 LJ Ch 271 273 (Lindley LJ). See also *Soar v Ashwell* (n 115) 394 (Lord Esher); 397 (Bowen LJ). Smith *Equity Jurisprudence* (n 121) does not include either in his chapter on constructive trusts, nor does A Underhill, *A Practical and Concise Manual of the Law Relating to Private Trusts and Trustees* (4th edn, Butterworths, London 1894); nor Spence, *The Equitable Jurisdiction* (n 122).
[135] See generally *Soar v Ashwell* (n 115).
[136] *Paragon* (n 110).
[137] NB: the original breach need not now be fraudulent- see *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164.
[138] *Williams* (n 109) [9] (Lord Sumption); *Soar v Ashwell* (n 115) 394 (Lord Esher); 397 (Bowen LJ); 405 (Kay LJ).

construction of their acts.'[139] Interestingly, trustees *de son tort* were sometimes, on account of their intermeddling, described as having undertaken to perform the trust.[140] This implies a close relationship between trustees *de son tort* and parol agreement trustees. Historically, however, trustees *de son tort* were often treated as being most similar to dishonest assistants[141] on the ground that neither were formally appointed trustees but both, by their interference, exposed themselves to the liabilities of express trustees and could be liable as accessories. Notably, trustees *de son tort* do not necessarily take legal title to the trust property.[142] In this respect, they are also similar to dishonest assistants but dissimilar to parol agreement trustees. Another major difference between trustees *de son tort* and parol agreement trustees is that the former, unlike the latter, have never been regarded as being made trustees for the prevention of actual fraud. In this respect, trustees *de son tort* are even more distantly related to parol agreement trustees than are dishonest assistants. Nevertheless, it is at least arguable that parol agreement trustees and trustees *de son tort* are both to be included amongst the ranks of trustees who are made so on account of their undertaking to perform the trust.

5.6.4 Parol agreement trusts and liability for knowing receipt

During the course of the research carried out for the purpose of ascertaining the position of parol agreement trusts *vis a vis* the statutory limitation period, it became apparent that the trusteeship of parol agreement trustees was sometimes described in pre-twentieth century cases in similar terms to the trusteeship of knowing recipients. This was surprising, for it flies in the face of the modern orthodoxy. The purpose of this section is to examine, through a doctrinal-historical lens, whether the

[139] ibid.
[140] *Hardy v Caley* (1864) 33 Beav 365, 55 ER 408, 367 (Romilly MR).
[141] See *Barnes v Addy* (n 133) 251 (Lord Selborne); *Soar* (n 115) 394 (Lord Esher MR); 396-397 (Bowen LJ).
[142] P Davies, *Accessory Liability* (Hart, Oxford, 2015) 90.

trusteeship of parol agreement trustees can be seen as related to that of knowing recipients. It should be noted that this section is not intended to provide a complete survey of academic positions regarding knowing recipients,[143] and it is hoped that the arguments proposed here might be further developed (or refuted) in the future.

5.6.4.1 Knowing receipt: a summary of the modern orthodoxy

According to the modern law, a party who knowingly receives trust property that has been transferred to him in breach of trust is liable as a knowing recipient. A party who takes with mere constructive notice of the trust or the breach of trust, or as a volunteer with no notice, will merely take subject to the beneficiary's equitable interest and will be subject to an equitable proprietary claim.[144] It is regarded as an essential characteristic of knowing receipt that the knowing recipient's 'possession is… at all times wrongful and adverse to the rights of both the true trustees and the beneficiaries.'[145] It should also be noted that a party who receives trust property as an agent cannot be liable for knowing receipt; the 'the recipient must have received the property for his own use and benefit'.[146]

The most widely accepted modern position is that the phrase 'constructive trustee' was historically used to describe knowing recipients[147] but that this is a misleading label for what is more accurately described as mere 'formula for equitable relief'.[148] The liability of knowing recipients is regarded as *in personam* liability which affects

[143] For examples, see C Harpum, 'The Stranger as Constructive Trustee: Part 1' (1986) 102 LQR 114; C Harpum, 'The Stranger as Constructive Trustee: Part 2' (1986) 102 LQR 267; C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in Mitchell, *Constructive and Resulting Trusts* (n 62); M Conaglen and A Goymer, 'Knowing Receipt and Registered Land' in Mitchell, *Constructive and Resulting Trusts* (n 62).
[144] See *Bank of Credit and Commerce International (Overseas)Ltd v Akindele* [2001] Ch 437, CA.
[145] *Williams* (n 109) [31] (Lord Sumption).
[146] *Agip (Africa) Ltd v Jackson* [1990] Ch 265, CA, 292 (Millett J).
[147] See *Williams* (n 109) [9] and [11] (Lord Sumption), [65] (Lord Neuberger PSC); *Paragon* (n 110) 408-409 (Millet LJ). On this point, see Davis & Virgo, *Equity & Trusts* (n 13) 904.
[148] *Paragon* (n 110) 408-409 (Millett LJ); Conaglen and Goymer, 'Knowing Receipt' (n 143). C.f. Mitchell and Watterson, 'Remedies' (n 143).

third parties to breaches of trust in a manner very similar to that of dishonest assistants.[149] One reason which has been given as to why the label 'constructive trustee' is misleading is that a knowing recipient 'does not have the powers or duties of a trustee, for example with regard to investment or management. His sole obligation of any practical significance is to restore the assets immediately'.[150] It has further been pointed out that '[n]obody involved, whether the dishonest receiver, the person who passed the property to him, or the claimant, has ever placed any relevant trust and confidence in the recipient'.[151] Accordingly, the knowing recipient 'never assumes the position of trustee'.[152] It has also been stated that knowing recipients are not constructive trustees because 'there is no question of the defendant holding property for the benefit of the claimant or of a proprietary remedy being imposed because it is irrelevant whether the defendant retains the property or not.'[153] It is thus apparent that the current judicial orthodoxy is that the *in personam* liability of knowing recipients is supplementary to, and separate from, the proprietary liability (which was traditionally called constructive trusteeship) which encumbers any party, knowing recipients included, who was not in the position of equity's darling when he received trust property.

Great significance is also afforded to the fact that knowing recipients obtain title and assume *in personam* liability in consequence of an unlawful transfer of property which was, prior to the transfer, subject to a pre-existing trust. The fact that the pre-existence of the trust is a feature common to knowing recipients and dishonest

[149] See generally *Williams* (n 109). See also S Panesar, *Exploring Equity* (2nd edn, Pearson, Harlow 2012) 471. Note that P Davies, *Accessory Liability* (Hart, Oxford 2015) 92, citing D Sheehan 'Disentangling Equitable Personal Remedies for Receipt and Assistance' (2008) 16 RLR 41, 58, accepts that a knowing recipient's liability is 'parasitic' upon the liability of the *de jure* trustees, but also that it is 'non-participatory'. C.f. Mitchell and Watterson, 'Remedies' (n 143).
[150] *Williams*, ibid [31] (Lord Sumption). C.f. Mitchell and Watterson, ibid.
[151] ibid [65] (Lord Neuberger PSC).
[152] ibid, quoting from *Paragon* (n 110) 408-409 (Millet LJ).
[153] A Burrows, *The Law of Restitution* (2nd edn, Butterworths, London 2002) 196.

assistants is often cited as a decisive factor in the treatment of these types of 'trustees' as similar to one another but different from instances of true trusteeship.[154] This is one of the primary reasons why the modern statutory limitation period does apply to knowing recipients and dishonest assistants.[155]

In summary, the modern judicial position is that, although knowing recipients were once called constructive trustees, they are not trustees at all. Like dishonest assistants, they are merely affected with accessorial *in personam* liability, and they can raise the limitation period as a defence. It can be seen, then, that the liability of knowing recipients is currently seen as almost entirely unrelated to the trusteeship of parol agreement trustees.

5.6.4.2 A doctrinal-historical reassessment of knowing receipt

It is appears from analysis of authorities from the nineteenth century that the historical orthodoxy regarding the doctrinal nature of knowing receipt differs significantly from the modern orthodoxy. There are three cases in particular which highlight this doctrinal schism.

The first is *Rolfe v Gregory*,[156] an authority which goes to the root of the historical difference between knowing recipients and traditional constructive trustees. Here, it was held that a proprietary claim[157] against a knowing recipient was not time-barred. The testator lent £600 to the defendant Gregory in return for a promissory note for £600 plus interest. The testator bequeathed the promissory note to trustees to hold on trust for the plaintiff. One of the trustees came to owe money to the defendant. The trustee delivered the promissory note to Gregory in satisfaction of the debt.

[154] *Paragon* (n 110); *Williams* (n 109).
[155] *Williams* (n 109).
[156] (1865) 4 De G, J & Sm 576, 46 ER 1042.
[157] The order issues by Lord Westbury (ibid) shows this to be the case.

Many years later, the plaintiff issued a proprietary claim against Gregory for the fruits of the promissory note. Gregory relied on the limitation period to resist her claim. Lord Westbury explained that:

> [i]t was contended before me that… Gregory became constructively a trustee of the debt for the parties interested, and that his liability in this Court was to be considered as resulting merely from constructive trust, that is from a trust raised by operation or construction of law… [This view] involves a misapprehension of the true principles on which the action of this Court is founded…The relief is founded on fraud and not on constructive trust. When it is said that the person who *fraudulently receives or possesses himself of trust property is converted by this Court into a trustee* [italics added to emphasise similarity with the wording in Lord Westbury's quote, below, from *McCormick v Grogan*], the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust.[158]

Lord Westbury evidently did not regard the defendant's proprietary liability as divorced from his status as a knowing recipient. Rather, because of the nature of his trusteeship, being founded on actual fraud and hence being more onerous than mere constructive trusteeship, the defendant could not rely on the limitation period to resist the proprietary claim. There are clear parallels with the position of parol agreement trustees. In *McCormick v Grogan*,[159] Lord Westbury used very similar words to

[158] *Rolfe* (n 156) 579 (Lord Westbury LC).
[159] (1869) LR 4 HL 82.

describe the liability of a secret trustee, explaining that secret trustees are '*converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud*.'[160] Lord Westbury's words in *Rolfe* and *McCormick* are congruous with one of the central arguments of this thesis, which is that a person declared a trustee for the prevention of fraud was regarded as type of actual trustee, susceptible to proprietary and *in personam* claims and no more able than an express trustee to shelter behind the limitation period. This can be contrasted with the position of a 'non-equity's darling constructive trustee' with no actual knowledge of the breach of trust by which he gained the property, who *was* regarded as a constructive trustee, was *not* susceptible to *in personam claims*, and *could* rely on a defence of limitation.

The second important case, *Perry v Knott*,[161] sheds further light on the question of why a knowing recipient was regarded as an actual trustee, rather than merely as a constructive trustee. Here, Lord Langdale MR asked, rhetorically, '[i]s it possible to conceive that [the knowing recipient] was ignorant of the trust? Is it possible to conceive that she did not undertake, jointly with [the offending trustee], to perform that trust?'[162] Pertinently, as argued in this thesis, parol agreement trustees are also made trustees because they have, expressly or by inference, undertaken to perform a trust. Lord Langdale's reasoning, especially when read alongside that of Lord Westbury in *Rolfe*, suggests that, in terms of their doctrinal characteristics, parol agreement trustees and knowing recipients may be rather more closely related than is commonly acknowledged.

[160] ibid 97 (Lord Westbury).
[161] (1841) 4 Beav 179, 49 ER 307.
[162] ibid 183. See also *Hennessey v Bray* (1863) 33 Beav 96, 55 ER 302, 102 (Romilly MR).

Perry also illustrates that knowing recipients were capable of being guilty of breaches of trust subsequent to the breach which led to their acquisition of the trust property. Until 1841, there was a rule of Chancery procedure that 'all parties jointly and severally liable were necessary parties'[163] to a suit. This meant that 'all trustees implicated in a breach of trust were necessary parties'.[164] Accordingly, all knowing recipients of trust property had to be made parties, alongside the express trustees, to a suit for breach of trust, otherwise the suit would be 'defective for want of parties'.[165] In *Perry*, the testator bequeathed £1,000 to his son to hold on trust for his daughter for life, in remainder to her children. The son was also one of the testator's executors. The executors transferred £1000 worth of stock from the estate to the son and the daughter as joint tenants. The son died, and the daughter transferred the stock into her own name and used it for her own purposes, and then sold it. The daughter's children filed the bill against the personal representatives of the son, alleging breach of trust. The defendants objected that the suit 'was defective for want of parties' on the ground that the other executors, *and the daughter*, should also be made parties. The court, therefore, was required to consider the nature of the daughter's liability as knowing recipient. Lord Langdale MR explained that, 'where trust money is sold, and paid away to a person who has no notice of the trust, and who has nothing more to do with it than the mere receiving it from a trustee',[166] then such a person was not to be made party to a suit for breach of trust. Because the daughter was not 'ignorant of the trust',[167] however, she was a party to the original

[163] This explanation appears in the note to *Devaynes v Robinson* (1857) 24 Beav 86, 53 ER 289. The same note explains that this rule was abolished by the '32d General Order of August 1841 (Ord. Can. 174).'
[164] ibid.
[165] *Perry* (n 161). This undermines the argument of Mitchell and Watterson, 'Remedies' (n 143) 153 that knowing recipients 'do not owe a secondary liability… by reason of their involvement in the trustees' breach of their custodial duties.'
[166] ibid 183 (Lord Langdale MR).
[167] ibid. This strongly suggests that, by 'notice', Lord Langdale MR meant actual notice, as opposed to constructive notice.

breach. What is very interesting, for present purposes, is that Lord Langdale MR went on to hold that, in addition to being a party to the original breach, the daughter was 'in point of fact, the person who committed the *second breach of trust* [italics added], which consisted of the sale and misapplication of the fund.'[168] This shows that the knowing recipient was regarded as a trustee in her own right, and that any disposition of trust property in breach of the trust amounted to a 'new' breach of trust, for which she was liable in her own right, rather than merely as an accessory to the original breach.[169]

The third of these significant cases is *Coxwell v Franklinski*.[170] Here, a husband was a life tenant under a marriage settlement. The trustees were empowered by the instrument to lend trust money to the husband upon the request of the wife (the defendant). The trustees, upon receipt of such a request, loaned £1,000 to the husband, secured by bond. The husband died intestate without having repaid the money. His wife was granted letter of administration. His estate was insufficient to meet the repayments. Many years later, his estate received a windfall, which was paid to the wife. The plaintiff, who was one of the husband's next-of-kin, claimed a portion of the £1,000. In her defence, the wife claimed entitlement to the £1,000 *qua* beneficiary under the marriage settlement. The plaintiff countered that the wife's claim under the marriage settlement was time-barred. Holding in favour of the wife, Kindersley VC stated that:

[168] ibid. See also *Jesse v Bennett* (1856) 6 De GM & G 609, 34 ER 1370, 612 (Lord Cranworth MR).
[169] For an interesting modern example of a knowing recipient (in this case, a company) being held capable of being liable in its own right for a breach of trust, see *Trustor AB v Smallbone (No 3)* (CA, 09 May 2000). This supports assertions made throughout Mitchell and Watterson, 'Remedies' (n 143).
[170] (1864) 11 LT 153.

> [i]t was a trust fund, known, of course, by the husband to be a trust fund, received by him as part of the trust fund, in his hands as part of the trust money, and, until it was repaid, retaining the character of trust money. In fact, the husband himself was constituted a quasi-trustee of this fund. He had it in his own hands, and, although he was not the trustee of the settlement, he made himself liable to the *cestuis que trust* who, after his death were entitled to this fund. He put himself in the position of a person having trust funds in his hands, known to be such, and received as such and it would be impossible for him or his executors to set up the Statute of Limitations as against the *cestuis que trust*.[171]

It is crucial here to note that the husband, to whom the limitation period did not apply, was described in the same terms as a knowing recipient, despite having received the fund in consequence of a lawful transaction by the trustees. Thus, this is a case in which the knowing recipient was not jointly liable with the trustees. The latter had not breached the trust. The husband's liability was not accessorial. Moreover, although such cases are rare, this is not the only case of non-accessorial knowing receipt.[172] Notably, this does not mean that fraud is irrelevant to such cases, for, as is the case with parol agreement trustees, any deviation by the defendant from his/her inferred undertaking would amount to a fraud.

In summary, the cases discussed above suggest that knowing recipients were not regarded as constructive trustees, but as something more; actual trustees constituted under the head of fraud on the ground that they had inferentially

[171] ibid 154.
[172] See also *Spickernell v Hotham* (1854) Kay 669, 69 ER 285.

undertaken to perform the trust. Hence, by obtaining trust property in their personal capacity, they were in the same position as express trustees who had misappropriated trust assets for themselves. As such, the limitation period applied to neither to *in personam* nor proprietary claims against knowing recipients.[173] Although the knowing recipient's *in personam* liability for the breach of trust by which he acquired the property was usually accessorial to the liability of the formally appointed trustees, this was not always so. Furthermore, the knowing recipient, as a trustee in his own right, was capable of perpetrating breaches of trust in his own right. It is thus submitted that the pre-twentieth century view of liability for knowing receipt was distinct in many important respects from the later orthodoxy.

5.6.4.3 A historical-doctrinal comparison of knowing receipt with parol agreement trusts

If the above analysis is accepted, clear parallels emerge from a historical comparison of knowing recipients with parol agreement trustees. Both were susceptible to proprietary remedies because they received property in circumstances in which it would have been an actual fraud for them to have denied the beneficiary's beneficial interest, and both were regarded by equity as being bound by a trust that they had expressly or impliedly undertaken to perform. Hence, both were made trustees because they had sufficient knowledge of the circumstances behind their receipt of legal title for equity to impose *in personam* as well as proprietary liability for the prevention or redress of the actual fraud which would occur if either dealt with the property inconsistently with the trust. Although the phrase 'constructive trust' has

[173] See also *Re Eyre-Williams* [1923] 2 Ch 533, CA; *Re Dixon* [1899] 2 Ch 561, Ch; *Ernest v Croydsill* (1860) 2 De G, F & J 175, 45 ER 589; *Spickernell v Hotham* (1854) Kay 669, 64 ER 285.

been associated with both, neither were regarded as constructive trustees before the twentieth century. Rather, both were regarded as types of actual trustees, more similar to express than constructive trustees, as is shown by the fact that the limitation period applied to neither.

The similarities between the two types of trustees can be illustrated by comparing the position of a knowing recipient who receives trust property and dissipates it with that the defendant in *Rochefoucauld* who obtained title to the estates pursuant to the parol agreement to take as trustee and then treated the estates as his own and sold them in order to repay his debts. There are, it is suggested, striking similarities between the two scenarios. Both defendants are, in effect, liable *in personam* to account for their dealings with the property because they knew of the circumstances by which they obtained the property and consequentially took as trustees pursuant to equity's general jurisdiction to intercede in cases of actual fraud.

Although detailed discussion of this next controversial point is beyond the scope of this thesis, it is also suggested that both parol agreement trustees and knowing recipients may logically owe duties beyond those of a trustee such as a 'non-equity's darling constructive trustee', but probably do not owe the full range of duties owed by express trustees. For example, as has been suggested above (at 4.3.2), parol agreement trustees probably do owe fiduciary duties such as the duty not to profit incidentally, but probably do not owe a duty to invest. If it is accepted that a knowing recipient is deemed to have undertaken to perform trust obligations, and is made a trustee for the prevention of fraud, then it would seem reasonable that s/he ought not to be permitted to retain profits obtained, for example, through the exploitation of information to which he became privy in consequence of his or her trusteeship. There are, of course, long-standing differences between knowing recipients and

parol agreement trustees. Perhaps the most obvious difference is that a knowing recipient, unlike a parol agreement trustee, always receives property subject to a pre-existing trust. Furthermore, knowing recipients were usually, although not always, jointly liable for breach of trust with the *de jure* trustee(s) who had transferred the property in breach of trust. In this sense, the liability of a knowing recipient has long been regarded as accessorial in most cases, although this should not obscure the fact that a knowing recipient, like a parol agreement trustee, was capable of assuming liability in his own right. Another difference between parol agreement trustees and knowing recipients is that the former receive legal title as a result of a lawful transaction, whereas knowing recipients usually, but not necessarily, receive the property as a result of a breach of trust. It is suggested, however, that, at least in terms of their doctrinal origins and affinities, the similarities between parol agreement trustees and knowing recipients are of more significance than the differences between these enduringly contentious types of trusts.

5.6.4.4 Why is the historical orthodoxy obscure?

The principles governing knowing receipt were very clearly elucidated in the cases referred to above in 5.6.4.2. It may seem strange, then, that previous attempts to analyse the historical basis of knowing receipt have resulted in conclusions which are incongruous with the above analysis, and that no affinities between knowing recipients and parol agreement trustees have been proposed by modern commentators. It is arguable, however, that the accepted historical background of knowing receipt has been unduly influenced by three distinct misconceptions, which will be examined in this part of the chapter.

The first relates to the famous *dictum* of Lord Selborne in *Barnes v Addy*,[174] which has been treated with almost statutory reverence, and forms the cornerstone of modern thinking on the nature of third party liability for breach of trust. This *dictum* is frequently regarded as authority that that knowing recipients or dishonest assisters were historically referred to as constructive trustees but that neither are in fact trustees at all.[175] The second is that the status of knowing recipients as 'true' trustees has been called into question on the ground that there was a good deal of judicial inconsistency regarding the extent to which knowing recipients could rely on the limitation period. The final misconception is manifested in the orthodox view that pre-1939 courts, when explaining that the limitation exemption did not apply to constructive trustees because they obtained possession in consequence of an unlawful transaction, were referring to knowing recipients.

5.6.4.4.1 The first misconception: Lord Selborne's dictum in Barnes v Addy

In *Barnes*, Lord Selborne stated that there are:

> certain persons who are trustees, and … certain other persons who are not trustees… Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust.* But, on the other

[174] (n 133).
[175] See generally *Williams* (n 109); *Paragon* (n 110). See also Davies, *Accessory Liability* (n 149) 89.

> hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, *unless those agents receive and become chargeable with some part of the trust property,* [italics added] or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.[176]

It is submitted here that, contrary to what is frequently asserted, the Lord Chancellor made no reference here to knowing recipients. When his Lordship mentioned three categories of 'strangers' who might be treated as 'trustees', he was referring to agents. This is made clear, for example, in *Re Spencer*,[177] in which Baggallay LJ stated that '[t]he judgment of Lord Selborne [in *Barnes*] is very valuable, as applying the rules as to agents to trustees'.[178] Of these agents, the first two categories, trustees *de son tort* and dishonest assistants, were not, according to Lord Selborne, actual trustees, but were treated as actual trustees, the former because of their intermeddling and the latter as because they fraudulently assist in the breach of trust.[179] Lord Selborne's third category comprised of agents in whom the trustees had deposited trust property, and who had knowledge of the trust, but who then deviated from the trust by taking the property for themselves or applying it for other purposes contrary to the trust. There are many cases from the nineteenth century in which the courts considered the liability of agents who had acquired legal title to trust property in their capacity as agents and then acted in breach of trust. These agents

[176] *Barnes* (n 133) 251-252.
[177] (1881) 51 LJ Ch 271.
[178] ibid 272.
[179] Note that, since, *Barnes*, it has been determined that the original breach of trust need not have been fraudulent, as long as the accessory's assistance was fraudulent.

were often solicitors[180] or 'merchants'[181] into whose business bank accounts trust money was paid. The general rule was that agents in whom, in their capacity as agents, property had been deposited, and who, at the behest of the trustees, entered into transactions which amounted to breaches of trust, were not parties to breaches of trust by the trustees,[182] unless, of course, those agents had dishonestly assisted in the breaches.[183] But agents with legal title who, subsequent to their acquisition of legal title and without proper authorisation from the trustees, applied the trust property in breach of a trust of which they had knowledge, became 'chargeable with the trust property'.[184]

5.6.4.4.2 'Chargeable agents' and knowing recipients compared

'Chargeable agents' of trustees formed a category of trustees in their own right, and were distinct from knowing recipients in a number of respects.[185] The leading nineteenth century authority on the application of the limitation period to trustees, *Soar v Ashwell*,[186] concerned a 'chargeable agent'. Here, a solicitor to the trust had lawfully invested trust money on behalf of the trust. In this capacity, he received and partially distributed the proceeds of the investment. But he also unlawfully retained some of the proceeds for his own purposes. After his death, the plaintiff, who was the sole remaining trustee and also a beneficiary, sued to recover the proceeds from

[180] E.g. *Lee v Sankey* (1872) LR 15 Eq 204.
[181] E.g. *Wilson v Moore* (1834) 1 My & K 337, 39 ER 709.
[182] See *Maw v Pearson* (1860) 28 Beav 196, 54 ER 340; *Attorney General v Earl of Chesterfield* (1854) 18 Beav 596, 52 ER 234; *Harvey v Mount* (1845) 8 Beav 439, 50 ER 172; *Marshall* (n 134).
[183] See *Fyler* (n 134); *Wilson v Moore* (n 181); *Marshall* (n 134).
[184] Examples include *Lee v Sankey* (n 180); *Bridgman v Gill* (1857) 24 Beav 302, 53 ER 374; *Hardy v Caley* (n 140); *A-G v Corporation of Leicester* (1844) 7 Beav 176, 49 ER 1031.
[185] Note that in *Agip (Africa)* (n 46) 291, Millett J alluded to the distinction between conventional knowing recipients and 'chargeable agents', but did not explore the dichotomy in detail. Agents of this type are dealt with by A J Oakley, *Constructive Trusts* (3rd edn, Sweet & Maxwell, London 1997), 239-240 as alternatives to knowing recipients. No reference is made in this context to *Barnes* of to the nineteenth century authorities discussed in this part of the thesis. Chargeable agents are discussed at length in Harpum, 'The 'Stranger: Part 2' (n 143), but are categorised as types of knowing recipients.
[186](n 115).

the solicitor's widow (the defendant) in the latter's capacity as executrix of the solicitor's estate. The defendant sought to rely on the limitation period. The majority held that the solicitor was agent of the trustees and had had property deposited in him in his fiduciary capacity. He had obtained possession of the trust property in consequence of a lawful transaction. Thus, although he was not holding the property on express trust for the trustees, he was, for the purposes of applying the limitation period, to be treated like an express trustee *for the trustees* in much the same manner as a director was, for the same purposes, treated as express trustee for his company. Although, in this case, the plaintiff sued *qua* trustee, Bowen LJ explained that, in similar cases, the beneficiaries would be entitled to claim against the agent with the same rights, against the agent, that their trustees possessed, 'not because the [agent] was their own trustee, but because he was bound under a direct trust to persons who were the trustees.'[187]

There are numerous other examples of chargeable agents being sued by trustees. This is unsurprising, for the agent's breach, unlike the breach perpetrated by a knowing recipient, amounted to a wrong against the trustees, who were his principals. For example, in *Bridgman v Gill*, [188] the trustees successfully sued agents who had misappropriated trust money which had been lawfully deposited in them by the trustees. Similarly, in *Lee v Sankey*,[189] a beneficiary/trustee claimed *qua* trustee against an agent who had, by an unauthorised transaction, transferred trust money, possession of which he had obtained by a lawful transaction, to another trustee/beneficiary at the latter's behest. *Lee* is also instructive because the agent only ever possessed the property ministerially. This can be contrasted with the

[187] ibid 399.
[188] (1857) 24 Beav. 302.
[189] *Lee v Sankey* (n 180).

position of a knowing recipient, whose liability depends, *inter alia*, on his or her having received the property in a non-ministerial capacity.

There were, however, some similarities between chargeable agents and knowing recipients. Chargeable agents *could* be held to be jointly and severally liable with one of more of the original trustees if, for instance, the trustee was in breach of his or her fiduciary duties by failing to supervise the agent who breached the trust[190] or because one or more of the trustees had acquiesced in or purported to authorise agent's the misappropriation of trust funds.[191] Furthermore, as demonstrated by, for example, *Soar, Lee* and *Bridgman*, chargeable agents, like knowing recipients, were precluded from relying on the limitation period.

There may also be scenarios in which there may be an overlap between liability as a chargeable agent and liability for knowing receipt. It has been suggested *obiter* that an agent of trustees who, at the behest of the trustees and knowing the terms of the trust, transferred trust property *to himself in his personal capacity*, could be liable as a knowing recipient.[192] In such a case, the breach of trust would committed by the trustee in ordering the transfer in breach of trust, and the agent would be a party to this breach by knowingly receiving the property in his personal capacity. In the only pre-20th century case covering such circumstances, however, the agent was made liable on the ground of dishonest assistance (by complying dishonestly, in his capacity as agent, with the trustee's order) rather than on the ground of his knowing receipt.[193]

[190] E.g. *Corporation of Leicester* (n 184); *Marshall* (n 134).
[191] E.g. *Lee v Sankey* (n 180).
[192] *Re Blundell* (1888) LR 40 Ch D 370.
[193] *Wilson v Moore* (n 181). See also *Re Blundell*, ibid.

In summary, the three most crucial respects in which chargeable agents differed from knowing recipients are:

1) chargeable agents, having become 'chargeable' on account of having breached their duties owed to the trustees, were only answerable to the beneficiaries vicariously;
2) bills against chargeable agents could be, and often were, filed by the trustees, rather than the beneficiaries;
3) the liability of chargeable agents did not depend upon personal, rather than ministerial, receipt of the trust property.

To these factors can be added three more general, albeit not decisive, differences:

1) chargeable agents were quite commonly referred to as constructive trustees, as in *Barnes* itself, and in *Soar*.[194] This is not surprising, for the phrase 'constructive trustee' was also sometimes used to describe agents who misappropriated property that they had obtained for their principals in cases in which the principal was not trustee for another;[195]
2) chargeable agents always initially obtained possession lawfully on the ground of a pre-existing fiduciary relationship;
3) it was common for chargeable agents not to be liable jointly with the trustees.

5.6.4.4.3 'Chargeable agents' and parol agreement trustees compared

If it is recalled that the liability of chargeable agents arose in consequence of their fiduciary relationship with the trustees, some affinities with parol agreement trusts

[194] *Soar v Ashwell* (n 115) 394 (Lord Esher MR).
[195] See *Cave v Makenzie* (1877) 46 LJ Ch 564.

emerge. In 3.3.2.1, above, it was submitted that an agent who dealt unlawfully with property obtained in his or her fiduciary capacity from his principal would be liable as a trustee on the ground of fraud. The occasional historical merger of agency and trust principles was also highlighted; certain cases of parol agreement trusts were sometimes seen as having been enforced on the ground that the 'trustee' was an agent who had misappropriated his or her principal's property. Thus, the liability of a chargeable agent, *vis a vis* the trustees, was not at all dissimilar from the liability of a parol agreement trustee *vis a vis* his or her beneficiary.

Nevertheless, it may be observed that chargeable agents were, in certain respects, doctrinally separate from parol agreement trustees. Unlike parol agreement trustees, chargeable agents were frequently referred to as constructive trustees, they held property in a fiduciary capacity before assuming their trusteeship, they did not acquire the property subject to an undertaking to hold it on trust for the beneficiaries (although, of course, they had undertaken to act as agents of the trustees) and, perhaps most importantly, they were only answerable to the beneficiaries on the strength of their fiduciary relationship with the trustees.

5.6.4.4.4 The second misconception: historical judicial inconsistency as to the nature of knowing receipt?

The view that knowing receipt has been treated inconsistently with respect to the application of the limitation period[196] seems to be attributable to subsequent interpretations of some observations made by Bowen LJ in *Soar*. He stated that

[196] See, for example, *Williams* (n 109) [16] (Lord Sumption).

there were several irreconcilable decisions concerning the application of the limitation period in various cases concerning 'instances of constructive trust'.[197] His Lordship took the view that:

> in some other cases, e.g., in Bridgman v. Gill, by Lord Romilly, and in Wilson v. Moore, by Lord Brougham, language has been employed in regard to the question of limitations of time in certain instances of constructive trust which can scarcely be reconciled with the language held in Bonney v. Ridgard; Beckford v. Wade; Townshend v. Townshend, and in other cases.[198]

Lord Bowen's comments have been taken as referring to inconsistencies relating to the status of knowing recipients as constructive trustees.[199] In fact, most of these cases are not concerned with knowing receipt, and his Lordship was likely referring to inconsistencies in the treatment of the various types of constructive trusts. The first two cases mentioned by Bowen LJ are cases in which the limitation period was inapplicable. *Bridgman* was, as described above, a case in which an agent of the trust was sued by the trustees. *Wilson*, also considered above, was decided on the ground of dishonest assistance.

The other three cases mentioned by Bowen LJ are cases in which the claims were held to be time-barred. As has been seen, *Beckford* concerned an action to recover land from a successor in title to the knowing recipient. The successor, not being equity's darling, was a mere constructive trustee and could not rely on the limitation period. *Townshend v Townshend*[200] also concerned a 'non-equity's darling constructive trustee'. Here, the plaintiff had a remainder interest in land. His parents,

[197] *Soar v Ashwell* (n 115) 397.
[198] ibid.
[199] Most notably in *Williams* (n 109) [19] (Lord Sumption) and [82] (Lord Neuberger PSC).
[200] (n 127).

who had a prior equitable interest, sold the land to the plaintiff's father's son from a previous marriage (the conveyance was also to the transferee's heirs and assigns). Many years later, the plaintiff sought to reclaim the land. The defendant was the wife and heir of the son to whom the land had been conveyed. The plaintiff claimed that the transfer was a fraudulent breach of duty, and that the purchaser knew that this was the case. It was held, however, that there was no fraud in the conveyance because the parties thought that the prior equitable interest had been released.[201] Therefore, it was 'merely the case of a trustee by implication, and as such affected by an equity; but that equity must be pursued within some reasonable time.'[202]

Bonney v Ridgard,[203] on the other hand, is a case of a proprietary claim against a knowing recipient.[204] The key point to note about this case, however, is that the parties who transferred the disputed property to the knowing recipient were not themselves express trustees. Rather, they were executors who, according to the will, were instructed to sell the testator's land to raise money for the estate. They sold a leasehold estate to the knowing recipient in satisfaction of a debt owed by one of the executors to him. The knowing recipient apparently knew of the circumstances of the sale, and later sold to a *bona fide* purchaser for value. Although it was held that the *in personam* claim against the knowing recipient was time-barred, this decision can be rationalised on the basis that, for limitation purposes, executors were treated differently from express trustees. Executors who retained any part of the residuary

[201] 'Covenants in the release' of the settlement from which the plaintiff derived his interest had been executed by the vendors.
[202] *Townshend* (n 127) 554-555 (Lord Commissioner Ashhurst).
[203] (1784) 1 Cox 145, 29 ER 1101.
[204] The bill was filed by the plaintiffs 'for an account of the rents and profits of these leasehold premises, and that plaintiffs might be let into possession of their respective shares of the rents and profits thereof'. The account, therefore, was to establish the value of the plaintiffs' shares in order that the plaintiffs could gain 'possession' of those shares.

estate were considered to be implied rather than express trustees, and claims against executors in respect of such property were subject to the limitation period.[205] In *Bonney*, there was no express trust in the will. Therefore, it is difficult to see how the knowing recipient could have been treated as being in the position of an express trustee for limitation purposes when he had, by his knowing receipt from a mere executor, impliedly undertaken to perform the office of executorship, to which the limitation period did apply.[206] A further point to note about *Bonney* is that it is not at all clear that the knowing recipient had more than mere constructive notice. Although Lord Kenyon MR's words would seem to suggest this was the case,[207] Lord Eldon, in a subsequent case, stated that, in *Bonney*, 'there were strong circumstances of evidence, that no fraud was intended'.[208] It may, therefore, be that the 'knowing recipient's' knowledge was of the existence of the will rather than of its terms- enough to give him constructive notice of the will's terms so as to be a 'non-equity's darling constructive trustee', but insufficient for him to be charged with actual fraud. In conclusion, whilst there are uncertainties surrounding the decision in *Bonney*, it is not a case concerning a party who knowingly received property as a result of a breach of an express trust, and it does not damage the position adopted in this section of the thesis regarding the nature of knowing receipt.

In summary, although the authorities cited by Bowen LJ show that there was some inconsistency in the application of the limitation period between different types of trustees, there is no evidence of inconsistency in the treatment of those who knowingly received trust property from express trustees in breach of trust, and there

[205] See, for example, *Re Davis* [1891] 3 Ch 119, CA.
[206] Strangely, however, it was held that the claim against the executors was not time-barred. This aspect is rather less easy to explain.
[207] See *Bonney* (n 203) 148-149 (Lord Kenyon MR).
[208] *M'Leod v Drummond* (1810) 17 Ves Jun 152, 34 ER 59, 165.

is nothing in these authorities to cast doubt on the conclusions drawn here regarding the historical basis of knowing receipt and the doctrinal similarities between knowing recipients and parol agreement trustees.

5.6.4.4.5 The third misconception: the distinction between constructive and other trustees

What the authorities consulted throughout part 5.6 of this thesis seem to suggest is that, when pre-1939 courts referred to 'a constructive trustee in the usual sense of the words - that is to say, of a person who, though he had taken possession in his own right, was liable to be declared a trustee in a Court of equity,'[209] they were not referring to knowing recipients, but to constructive trustees of the type discussed above at 5.6.2. Such trustees are likely to obtain title to the subject matter of the constructive trust in consequence of an unlawful transaction (e.g. a breach of trust by a trustee in conveying the trust property to a volunteer or a purchaser with no notice of the breach, or a breach of fiduciary duty amounting to self-dealing or the taking of an incidental profit), and all have been routinely described as constructive trustees for several centuries. Thus, the weight of authorities suggests that the much-heralded dichotomy between those who lawfully took title as fiduciaries and those who took in their own right but were liable to be later declared trustees was formulated to distinguish between express trustees and their equivalents on the one hand and traditional constructive trustees on the other hand. Knowing recipients, made trustees by virtue of equity's jurisdiction to intercede in cases of fraud, fell within the former category, and were not regarded as constructive trustees.

[209] *Taylor* (n 115) 651 (Viscount Cave).

5.6.5 Summary: parol agreement trusts and constructive trusts

In addition to mere constructive trustees, there were certain classes of persons who, although not formally appointed by a trust instrument, were not usually described as constructive trustees. Rather, these trustees and were regarded as similar to express trustees in terms of their duties and liabilities and were treated as express trustees for the purposes of the applying the limitation period. Being as parol agreement trusts fit this description (see above, 4.3), it is perhaps unsurprising that their closest relatives, at least in terms of doctrinal development, should also be found amongst trustees of this kind. What is surprising, however, is that those which bear the closest doctrinal affinities with parol agreement trustees would seem to be knowing recipients. Interestingly, the liability of chargeable agents, with whom knowing recipients have frequently been confounded, was also closely related to that of parol agreement trustees, albeit for different reasons. Other 'trustees' of this type, such as trustees *de son tort* and dishonest assistants, whilst sharing some characteristics with parol agreement trusts, were generally described in very different terms from the latter in the older cases.

Although the modern orthodoxy treats knowing recipients as third parties to breaches of trust who are liable *in personam*, who can claim the limitation period as a defence, and for whom the term 'trustee' is not an apt description, the historical position was more complex. Knowing recipients were made trustees for the prevention of actual fraud, and could not shelter behind the limitation period in respect of proprietary or *in personam* claims any more than could express trustees; they were regarded as having undertaken to perform the trust, and were accordingly treated as express trustees, capable themselves of committing breaches of trust. In these respects, notwithstanding that they were usually jointly and severally liable with the original

trustees for the breach of trust which precipitated their acquisition of the trust property, knowing recipients were very similar to parol agreement trustees. This demonstrates that equity had coherent mode of dealing with those whose acquisition of legal title prompted equity to declare them trustees on the ground of actual fraud, and that those deemed to have undertaken to perform a trust, whether a pre-existing trust or one arising to prevent deviation from the undertaking, were treated in much the same manner.

5.7 Overall Summary

The modern orthodox view which prevails, but which is the subject of considerable academic debate and some judicial inconsistency, is that 'non-equity's darling' recipients of trust property are not trustees, but that secret trustees and their *inter vivos* equivalents, '*Pallant v Morgan* trustees', *Rochefoucauld*-type trustees, 'common intention' trustees, surviving testators under the doctrine of mutual wills, 'subject to contract' trustees, fiduciaries in receipt of incidental profits and secret commissions and trustees *de son tort*, amongst others, are constructive trustees. Liability for knowing receipt refers only to *in personam* liability which affects third parties to breaches of trust and is thus considered, like liability for dishonest assistance, to be far removed from the concept of 'true' trusteeship. Furthermore, the phrases 'actual fraud' and 'constructive fraud' have been replaced in popular legal parlance by the more amorphous concept of 'unconscionability', [210] which is used to justify the imposition of most, if not all, of the types of trusts currently recognised as constructive trusts. This is very much at odds with the historical position, according to which trusts imposed for the prevention of actual fraud were treated with doctrinal

[210] C.f. N Hopkins, 'Conscience, Discretion and the Creation of Property Rights' (2006) 26 LS 475, who asserts that 'nothing turns' on the distinction between fraud and unconscionability.

consistency, as evidenced by the development of the doctrine of parol agreement trusts and its doctrinal relationship with knowing receipt and the liability of chargeable agents.

Had these jurisprudential developments led to increased clarity and consistency in the law of constructive trusts, then there could be much to be said for the abandonment of traditional doctrine and terminology. The fact that there is such discord amongst contemporary judges and jurists alike, however, suggests that there may be good reason to lament the lack of regard which is currently paid to the authorities and principles from earlier times. Application of these historical principles to the modern law, which might involve ‘common intention’ trusts, and mutual wills being subsumed within the doctrine of parol agreement trusts, as well as recognition of the status of knowing recipients as true trustees with doctrinal affinities with parol agreement trusts could well, it is submitted, provide a means by which the law might develop in the future within a consistent doctrinal framework.

Chapter 6: Overall Conclusion[1]

The most significant conclusion that can be drawn from the arguments and analysis in this thesis is that all categories of parol agreement trusts are enforced pursuant to a single doctrine, the doctrine of parol agreement trusts. It is through the research conducted for the purposes of this thesis that the existence, nature, scope and requirements of this doctrine have been uncovered for the first time. By virtue of the doctrine, parol agreements may be given effect, for the prevention of fraud, through the imposition of trusts. The fraud arises when a grantee takes legal title to property in circumstances where his/her conscience is affected by a parol agreement connected with his/her acquisition of the property, and then reneges upon that agreement. The grantee's conscience will be affected if the other party, as determined by the set of rules applicable to the scenario in question, relied on the parol agreement and s/he knew this. To prevent such fraud, the grantee takes the property as trustee, and can thus be compelled to give effect to his/her promise. Despite some recent errant judgments, the doctrine uncovered here has very strong foundations in numerous authorities, and has been endorsed by the highest courts on numerous occasions. Despite some degree of overlap with the doctrine of proprietary estoppel and the law of contract in terms of the scenarios to which each are applicable, the authorities overwhelmingly indicate that the doctrine of parol agreement trusts occupies a distinct and justifiable position within the modern law of property.

[1] This chapter contains material published in G Allan, 'Once a Fraud, Forever a Fraud: the Time-Honoured Doctrine of Parol Agreement Trusts' (2014) 34 LS 419-443 and G Allan, 'Ceylon Coffee, the Comtesse and the Consignee: A Historical Reappraisal of *Rochefoucauld v Boustead*' (2015) 36 Journal of Legal History 43.

In unearthing this doctrine, several other important findings were made and conclusions reached. This thesis, and the relevant article derived from it,[2] contains the only complete and accurate account of the facts of *Rochefoucauld v Boustead*,[3] a case which is widely acknowledged as the leading authority on *inter vivos* parol agreement trusts. Perhaps the most significant finding is that, contrary to what was reported, the land which was the subject matter of the parol agreement trust was sold by officers of the District Court in Ceylon as a result of the mortgagees having successfully sued the Comtesse de la Rochefoucauld for a sale in execution. In addition to showing that many previously published accounts of the facts of *Rochefoucauld* are inaccurate, this definitively demonstrates that the facts of *Rochefoucauld* are more closely analogous to those in the *Pallant v Morgan*[4] line of cases than in secret trusts or cases such as *Bannister v Bannister*.[5] Furthermore, the Court of Appeal's treatment of the factual scenario in *Rochefoucauld* sheds much light on the nature of the fraud which prompts equity's intervention in cases concerning parol agreement trusts.

It is apparent from the facts and judgment of *Rochefoucauld* that a party who reneges on a parol agreement upon which the other party thereto has relied will be guilty of a fraud even when the property which forms the subject matter of the parol agreement was transferred by a third party who has no interest in, or knowledge of, the parol agreement. This is entirely congruous with the findings from the analysis of other cases concerning parol agreement trusts of all categories; one of the key conclusions of this thesis is that, within the context of parol agreement trusts, a trust may arise for the prevention of fraud regardless of any detrimental reliance by the

[2] Allan, 'Ceylon Coffee' ibid.
[3] [1897] 1 Ch 196 (CA).
[4] [1953] Ch 43 (Ch).
[5] [1948] 2 All ER 133 (CA).

transferor of the property. Moreover, it is not necessary to prove that reneging on the parol agreement would enable the delinquent party to gain, nor that this would cause the other party to suffer any loss. Rather, the common denominator running through the myriad authorities is that, so long as the other party to the parol agreement relied thereupon, and the recipient of the property knew this to be so, any deviation from what was agreed would amount to a fraud. The trust arises in order to prevent such fraud. This species of fraud is not results-driven, but conscience-driven, meaning that a party's conduct will be adjudged fraudulent based on equity's assessment of his or her conduct, rather than out of consideration of the consequences of the conduct. This concept of equitable fraud, which is very old, very well-supported by authorities, and likely derives from Roman law, has been examined and rationalised for the first time in this thesis and the articles derived therefrom.

It is further argued in this thesis that, according to modern nomenclature, parol agreement trusts are best regarded as constructive trusts. *Inter vivos* parol agreement trusts thus fall within the Law of Property Act, s53(2). Although this is the position taken by most modern jurists, what this thesis reveals is a historical-doctrinal explanation of why this is so. Until the early twentieth century, trusts imposed for the prevention of fraud formed a genus of trusts in their own right; they were not classified as express trusts, resulting trusts or constructive trusts. Rather, they were trusts arising out of equity's ancient general jurisdiction to intercede in all cases of fraud. There was no reason for the courts to classify them as constructive trusts, for constructive trusts were not within the ambit of the Statute of Frauds, s8, which was the predecessor section of s53(2). Furthermore, whilst it is apparent that parol agreement trusts were not regarded as express trusts and were not subject to any of the statutory formality requirements which regulated express trusts, they were seen

as sharing some characteristics with the latter, as is evidenced by the fact that they were treated in a manner similar to express trusts for the purposes of applying the statutory limitation period. It was not until *Taylor v Davies*[6] that parol agreement trusts were first judicially described as constructive trusts, in consequence of that phrase being expanded to cover all trusts arising out of equity's general jurisdiction that were not already classed as resulting trusts. This absorption of trusts arising for the prevention of fraud within the ambit of constructive trusts has gradually become entrenched to the extent that it is difficult to argue that parol agreement trusts are not, by a modern definition, constructive trusts. Conversely, the classification of any parol agreement trusts as resulting trusts would seem to run contrary to principles and to the weight of authorities.

The doctrinal-historical analysis in this thesis also assists in understanding the relationship between the prevention of fraud as a justification for the enforcement of parol agreement trusts and the principle that equity will not permit a statute to be used as an instrument of fraud; this thesis and, the article which draws from this material, provide the most detailed examination of this issue to date. Essentially, equity's jurisdiction to intercede on the ground of fraud in cases concerning parol agreement trusts pre-dates the earliest relevant statutory formality requirements. Ever since the Statute of Frauds, the courts have taken the position that the legislature has never sought to interfere with equity's general jurisdiction to impose trusts in order to prevent fraud. This latter proposition, which is frequently summarised by the phrase: 'equity will not allow a statute to be used as an instrument of fraud', should not obscure the fact that the prevention of fraud provides the justification for the enforcement of all parol agreement trusts, regardless of the

[6] [1920] AC 636 (PC).

apparent applicability of statutory formality requirements to any given scenario.

By building on the conclusions which are outlined in the previous two paragraphs, this thesis has been able to provide an original answer the frequent charge that, in enforcing parol agreement trusts, courts of equity paid scant regard to the doctrine of parliamentary sovereignty. It has been shown that, in actuality, the pre-twentieth century courts took very seriously their duty to accede to the will of Parliament. The courts' power to recognise and enforce parol agreement trusts, seemingly in the face of unequivocal statutory formality requirements, rested firmly upon the entirely reasonable position that Parliament has never regulated equity's general jurisdiction to impose trusts in order to prevent fraud. This approach was, in respect of *inter vivos* parol agreement trusts, vindicated with the enactment of the Law of Property Act 1925, s53(2), which expressly excludes 'constructive trusts' from the ambit of s53(1)(b). But this time-honoured reasoning still applies today to *post mortem* parol agreement trusts. Thus, the entirely uncontroversial proposition that the Wills Act 1837, s9, was not intended by Parliament to, and does not, affect resulting trusts which are imposed upon legacies applies equally to secret trusts.

In fact, many of the propositions laid down in the previous paragraphs of this chapter have particular resonance in respect of secret trusts. Notwithstanding the many academic assertions to the contrary, it can be confidently asserted that the vast bulk of authorities support the view that all secret trusts are enforced for the prevention of fraud, pursuant to the instrument of fraud principle. Furthermore, this thesis contends that the 'fraud theory' and the '*dehors* the will theory' are not mutually exclusive; rather, a combination of these theories provides the explanation for why and how equity is able to claim jurisdiction to enforce secret trusts without acting in defiance

of the Wills Act 1837. Misapprehensions as to the juxtaposition between the ‘fraud’ and ‘*dehors*’ theories seem to have resulted, in part, from inconsistencies between the judiciary and jurists as to the meaning of ‘testamentary disposition’.

The conclusions reached as a result of the historical-doctrinal analysis which forms the basis of this thesis have also enabled original insights to be drawn as regards the place of parol agreement trusts within the law of constructive trusts generally, in terms of both the historical development of constructive trusts and the extent to which the deployment of principles associated with parol agreement trusts may provide a sound doctrinal platform for the future development of the law. More specifically, this thesis proposes that many controversies in the current law, especially those arising out of recent leading cases, could be resolved if ‘common intention’ constructive trusts are to be treated as falling within the doctrine of parol agreement trusts. By the same token, the principles which underpin the doctrine of parol agreement trusts could have provided a sound doctrinal framework to support the development of the ‘subject to contract’ constructive trusts, which would seem now to have largely been superseded by statutory alterations to the doctrine of privity of contract . The doctrine of parol agreement trusts is even potentially capable of justifying the doctrine of mutual wills.

In terms of historical development, the findings in this thesis as to the evolution of the classification of trusts have enabled a novel approach to be taken in terms of seeking to place parol agreement trusts within the law of trusts generally. It is evident from, for example, the application of the pre-1939 statutory limitation period that parol agreement trusts, being trusts raised under the head of fraud, were seen as more akin to express trusts than what were traditionally termed constructive trusts.

Moreover, other trusts which were not strictly express or constructive were also treated similarly by the courts. Included within the ranks of such trusts were trustees *de son tort* and knowing recipients, both of which were sometimes described as arising out of an inferred undertaking. Of these, the latter, being imposed on the ground of fraud on the basis of an inferred undertaking by the defendant to take as trustee, are arguably most closely allied to parol agreement trusts in terms of their doctrinal development before the twentieth century. It seems that the historical-doctrinal nature of knowing receipt has been obscured as a result of misinterpretations of Lord Selborne's *dictum* from *Barnes v Addy*,[7] as well as by the misconception that the applicability of the limitation period to knowing recipients was afforded inconsistent treatment by nineteenth century courts, and by a general lack of appreciation as to the meaning given historically to the phrase 'constructive trustee'. It is tentatively suggested that the view that knowing recipients are in many respects close cousins of parol agreement trusts may challenge the modern orthodox position that knowing recipients are not trustees and are merely subject to accessorial *in personam* liability in the same manner as dishonest assistants. It is further suggested that the fraud-based trusteeship which affects 'chargeable agents' of express trustees is also doctrinally related to parol agreement trusteeship but should be recognised as distinct from liability for knowing receipt.

A general observation that may be made on the basis of the research and analysis conducted in furtherance of this thesis is that the general decline in the use of the term 'fraud' in cases of parol agreement trusts and related trusts may be seen as a regrettable development. Replacing 'fraud' with 'unconscionability' may not be a matter of mere semantics; it seems that the former amounted in common judicial

[7] (1874) LR 9 Ch App 244.

parlance to ‘actual fraud’, which formed the basis of equity’s jurisdiction to recognise certain trusts which were similar to express trusts, even in ostensible defiance of statutory formality requirements. Also encompassed within the modern concept of unconscionability, however, is what was once called ‘constructive fraud’. This ‘virtual’ form of fraud only permitted the courts to raise mere constructive trusts, which shared few similarities with express trusts or trusts arising on the ground of actual fraud. Owing to the aforementioned evolution in nomenclature, trusts with a basis in actual fraud and ‘traditional constructive trusts’ are now all classified as constructive trusts, and are often all said to arise to prevent unconscionable conduct. This may be a significant reason as to why some long-standing and fundamental differences between certain different classes of trusts are no longer widely recognised.

In terms of future endeavours, further research into the reasons for the decline in the use of the term ‘fraud’ and its replacement with language such as ‘unconscionability’ may be warranted, and it may be fruitful to examine whether the characterisation in this thesis of equitable fraud as a means by which to regulate conduct has any wider implications within private law. Moreover, it may be interesting to investigate the extent to which the doctrine of parol agreement trusts and equity’s fraud-based jurisdiction have endured in the twentieth century within other common law legal systems.[8] It is also suggested that the new findings presented here in respect of the doctrinal nature of knowing receipt may justify further consideration of the juxtaposition of the liability of knowing recipients and other types of private law third party liability. As a wider point, it can be observed that long-established legal doctrines and cases, even leading authorities, that were once regarded as largely

[8] This aspect is covered in respect of secret trusts, to a certain extent, in G Allan, ‘The Secret is Out There: Searching for the Doctrine of Secret Trusts through Analysis of the Case Law’ (2011) 40 CLWR 311.

straightforward may eventually come to be seen as controversial or may become open to misinterpretation. Furthermore, the evolution of legal terminology and judicial and academic thinking may cause judicial statements to be construed by modern authorities in a manner other than that which was originally intended. It is hoped that the research conducted for the purposes of this thesis may, to some degree, serve to assist in reasserting the value of historical-doctrinal research, and that it may provide some encouragement for similar research to be conducted in other areas of law.

By way of epilogue, a final point to raise is just how effective the doctrine of parol agreement trusts has proven in terms of preventing fraudulent conduct. The doctrine has, in the twenty-first century alone, aided the young lover who is persuaded to spend money improving land that is not at law hers,[9] the first-generation immigrant who is deceived into transferring his hard-earned land to a better-educated and avaricious son or daughter,[10] the informal business partner who is denied his rightful remuneration by a conspiracy of lies,[11] the victim of a miscarriage of justice who relies on an agreement with an insincere friend in order to try to obtain a home,[12] and the daughter whose inheritance is jeopardised by the informality of her parents' dealings with the matrimonial home upon their divorce.[13] Application of the same doctrine has, in far older cases, provided the very same assistance to the woman whose faith is betrayed by the man who purported to purchase her land for her benefit,[14] the daughter who forfeited her inheritance in reliance on a parol agreement with her father,[15] the wife who transferred her land to her husband to enable him to

[9]*Cox v Jones* [2004] EWHC 1486 (Ch), [2004] 2 FLR 1010.
[10]*Ali v Khan*, [2002] EWCA Civ 974, [2009] WTLR 187; *Kuppusami v Kuppusami* [2002] EWHC 2578 (Ch).
[11]*Singh v Anand* [2007] EWHC 3346 (Ch).
[12]*Samad v Thompson* [2008] EWHC 2809 (Ch), [2008] NPC 125.
[13]*Staden v Jones* [2008] EWCA Civ 936, [2008] 2 FLR 1931.
[14]*Rochefoucauld* (n 3).
[15]*Young v Peachy* (1741) Atk 254, 26 ER 557.

attempt to settle his debts,[16] the man falsely accused of bigamy who entrusted his land to his friend,[17] and the man who, upon his retirement, was persuaded to surrender his home when he sold his business premises.[18] Hence, it can be seen that this single doctrine has displayed an astonishing ability to protect the weak from the crafty or the careless, even when the precise social circumstances giving rise to the said weaknesses could not have been envisaged by the architects of the doctrine. The doctrine has undeniably stood the test of time, and has, for centuries, provided a guiding hand for judges walking the tightrope of balancing the need to adhere to formality requirements without allowing those formality requirements to be used in furtherance of the very evils which they were intended to prevent. For such a doctrine to be lost and replaced by new laws or ideas could well prove detrimental to the ability of the law in this area to protect the vulnerable of the future.

[16] *Re Duke of Marlborough* [1894] 2 Ch 133, Ch.
[17] *Davies v Otty (No 2)* (1865) 35 Beav 208, 55 ER 875.
[18] *Booth v Turle* (1873) LR 16 Eq 182, Ct of Chancery.

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Appendix

English cases where the prevention of fraud was held to be the underlying reason for the enforcement of secret trusts

I. Fully secret trusts cases

Thynn v Thynn (1684) 1 Vern 296, 23 ER 479

Devenish v Baines (1689) Prec Ch 3, 24 ER 2

Oldham v Litchford (1705) 2 Freem Chy 284, 23 ER 923

Sellack v Harris (1708) 2 Eq Ca Abr 46

Whitton v Russell (1739) 1 Ves 124, 26 ER 285

Drakeford v Wilks (1747) 3 Atk 539, 26 ER 1111

Reech v Kennegal (1748) 1 Ves Sen 123, 27 ER 932

Boson v Statham (1760) 1 Cox 16, 29 ER 1041

Barrow v Greenough (1796) 3 Ves Jun 152, 30 ER 943

Muckleston v Brown (1801) Ves Jun 53, 31 ER 934

Stickland v Aldridge (1804) 9 Ves Jun 517, 32 ER 703

Chamberlain v Agar (1813) 2 V & B 257, 35 ER 317

Russell v Jackson (1852) 10 Hare 204, 68 ER 900

Wallgrave v Tebbs (1855) 2 K & J 313, 69 ER 800

Lomax v Ripley (1855) 3 Sm & G 48, 65 ER 558

Tee v Ferris (1856) 2 K & J 357, 69 ER 819

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Moss v Cooper (1861) 1 J & H 352, 70 ER 782

Sweeting v Sweeting (1863) 33 LJ Ch 211

Cullen v Attorney General for Ireland (1868) LR 3 Ch App 362

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McCormick v Grogan (1869) LR 4 HL 82

Norris v Fraser (1873) LR 15 Eq 318

Rowbotham v Dunnett (1878) 8 Ch D 430

Re Boyes (1884) 26 Ch D 531

Re Spencer's Will (1887) 57 LT 519

Re Stead [1900] 1 Ch 237, Ch

Re Pitt-Rivers [1902]1 Ch 403, CA

Re Maddock [1902] 2 Ch 220, CA

Re Gardner (no 1)[1920] 2 Ch 523, CA

Re Falkiner [1924] 1 Ch 88, Ch

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II. Half-Secret Trusts Cases

Podmore v Gunning (1836) 7 Sim 643 , 58 ER 985

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Re Fleetwood (1880) 15 Ch D 594

Blackwell v Blackwell [1929] AC 318, HL

Re Keen [1937] Ch 236, CA

Re Cooper [1939] Ch 811, CA

Re Young [1951] Ch 344, Ch

III. Cases Where the Doctrine of Secret Trusts was Being Discussed Generally

Dufour v Pereira (1769) Dick 419, 21 ER 332. A full version of Lord Camden LC's judgment in *Dufour* (fuller than appears in Dicken's report), in which the affinity between secret trusts and mutual wills is explained in some detail is quoted in *Dale* (n 65) 40-42 (Morritt J).

Tharp v Tharp [1916] 1 Ch 142, Ch

Healey v Brown [2002] WTLR 849, Ch

De Bruyne v De Bruyne [2010] EWCA Civ 519, CA

AM v SS [2014] EWHC 2887 (Fam)